U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals

Chairman

5107 Leesburg Pike, Suite 2400
Falls Church, Virginia 22041

BIA 04-01

February 5, 2004

MEMORANDUM TO: BIA Staff

FROM: Lori Scialabba
Chairman

SUBJECT: New protocol and training on the scanning of ROPs

This is to announce training and implementation for a new, mandatory protocol governing scanning of records of proceedings (ROPs) at the Board, effective February 19, 2004.

In our current environment of deadlines and tight time frames for processing and retrieval of records at the Board, it has become increasingly important to be able to track and locate records of proceedings on a moment's notice. Barcode scanning and inventories have assisted greatly in this regard, but more can be done to make record tracking and retrieval fast and dependable. Accordingly, beginning Thursday, February 19, we will be following a new standard procedure for scanning files at the Board. Generally, the new scanning protocol involves scanning "out" as well as scanning "in," and includes most attorneys as well as clerks and support staff.

Adherence to the procedures in the new scanning protocol will be required of all BIA employees. Details will be found in the copy of the protocol accompanying this memorandum. The table of contents should direct you easily to the portion of the protocol most relevant to you.

Mandatory training on procedures for the scanning of files, and on the new protocol, will be provided Tuesday through Thursday February 17, 18, 19, 2004, in the BIA Conference Room. Each training session will last approximately 15 minutes, plus time for questions & answers. Details on scheduling will be provided by the trainers, Lillian Ortiz, Wendy Ikezawa, and Hope Holiona, in due course. Many thanks to Lillian, Wendy, and Hope for drafting the protocol and associated scanning aids, and arranging and executing this training.

If you have questions concerning the new protocol or the training, please contact your supervisor. Thank you

Board of Immigration Appeals

BIA 04-01

Rev. 2-05-04
Effective 2-19-04

SCANNING PROTOCOL

I Purpose

In light of the increased movement of cases, ***EVERYONE*** at the Board of Immigration Appeals must now be responsible for the scanning of case files. Scanning is an essential tool for identifying the location of ROPs and is used by many different people within the BIA for various reasons, including the tracking of ROPs for parties within and outside the BIA, the filing of correspondence (e.g., motions, change of address/attorney representation forms, extension requests, supplemental briefs), responding to FOIA requests, and associating files which have been separated. The rapid movement of cases has greatly increased the risk of losing an ROP. An ROP scanned to you is considered your responsibility. An ROP scanned out from you removes it from your general area of responsibility.

II Policy

Everyone at the Board of Immigration Appeals is responsible for assuring that each ROP is scanned ***"out"*** and ***"in"***. Therefore, we are instituting the following Scan Out/Scan In Protocol for the scanning of all cases.

✓ ***There will be no exception to this policy.***

To assist in the implementation of this scanning protocol the following pages provide guidance for use in particular situations.

TABLE OF CONTENTS

ATTORNEY SCANNING PROTOCOL

Scan Out

- When an ROP leaves your desk, scan it to the location where you are sending it, or to the person to whom you are sending it.*

  – When giving an ROP to a legal assistant for typing or revision, scan it to that legal assistant/location.

  – When placing an ROP into circulation, scan the ROP to the circulation location.

  – When moving an ROP to your supervisor's desk or forwarding it to anyone, scan it to that person.

Scan In

- When receiving an ROP, scan it to yourself.*

  – When you receive an ROP from an attorney manager, legal assistant or supervisory legal assistant after assignment, typing, or revision, scan it to yourself.

  – When receiving an ROP from anyone (Board Member, Clerk's Office, your supervisor, etc.), scan it to yourself.

Flexiplacers

- When you take an ROP home, scan it to your home.
- When you return an ROP to the office, scan it to your office.

SCANNING REQUIRES CORRECT INPUT OF BOTH FUNCTIONAL LEVEL AND RESPONSIBLE PARTY.

If you are unsure of the appropriate Functional Level, please refer to the attached Functional Level Reference Guide or see your supervisor.

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* Subject to screening panel procedure where administrative staff scan the ROPs (see page 6).

SUPERVISORY LEGAL ASSISTANT SCANNING

Scan Out

- When an ROP leaves your desk, scan it to the location/person to which you are sending it.

  – When returning an ROP to an attorney after assigning, typing, or revising, scan it to the attorney.

  – When moving an ROP to a legal assistant's desk, scan it to that legal assistant.

  – When ROPs are placed into circulation, scan the ROPs to the appropriate circulation location.

  – When moving an ROP to an attorney manager's desk or forwarding it to anyone else, scan it to that person.

  – When forwarding an ROP to the Clerk's Office for continued processing, scan it to the appropriate Clerk's Office team and team leader.

  – When forwarding a case to another building, scan it to the appropriate person/location.

Scan In

- – When receiving an ROP, scan it to yourself.

  – When picking up an ROP for assignment, scan it to yourself.

  – When picking up an ROP for typing, scan it to yourself.

  – When an attorney returns an ROP to you for revision, scan it to yourself.

SCANNING REQUIRES CORRECT INPUT OF BOTH FUNCTIONAL LEVEL AND RESPONSIBLE PARTY.

If you are unsure of the appropriate Functional Level, please refer to the attached Functional Level Reference Guide or see your supervisor.

LEGAL ASSISTANT SCANNING PROTOCOL

Scan Out

- When an ROP leaves your desk, scan it to the location/person to which you are sending it.

  – When returning an ROP to an attorney after assigning, typing, or revising it, scan it to the attorney.

  – When moving an ROP to your supervisor's desk or forwarding it to anyone else, scan it to that person.

Scan In

- When receiving an ROP, scan it to yourself.

  – When picking up an ROP for assignment, scan it to yourself.

  – When picking up an ROP for typing, scan it to yourself.

  – When an attorney returns an ROP to you for revision, scan it to yourself.

Flexiplacers

- When you take an ROP home, scan it to your home.
- When you return an ROP to the office, scan it to your office.

SCANNING REQUIRES CORRECT INPUT OF BOTH FUNCTIONAL LEVEL AND RESPONSIBLE PARTY.

If you are unsure of the appropriate Functional Level, please refer to the attached Functional Level Reference Guide or see your supervisor.

SCREENING PANEL (P3) ADMINISTRATIVE STAFF SCANNING PROTOCOL

Scan Out

- When an ROP leaves your desk, scan it to the location/person where you are sending it.

  – When moving an ROP to a Board Member's office, scan it to ***"Screening Board Member"*** (Responsible Party) location.

  – When moving an ROP to your supervisor's desk or forwarding it to anyone else, scan it to that person.

  – When returning an ROP to the Clerk's Office for quality problem or continued processing, scan it to the appropriate Clerk's Office team and team leader.

  – When returning a completed ROP to the Clerk's Office for break down, scan it to ***"SP Transit to CO"*** (Responsible Party).

Scan In

- When receiving an ROP:

  – When receiving a RUSH ROP, scan/assign to staff attorney.

  – When receiving a regular ROP, scan to Screening Panel (Panel 3) cabinets.

  – When receiving an ROP from anyone (Board Member, Clerk's Office, Screening Panel, your supervisor, etc.), scan it to yourself.

Flexiplacers

- When you take an ROP home, scan it to your home.
- When you return an ROP to the office, scan it to your office.

SCANNING REQUIRES CORRECT INPUT OF BOTH FUNCTIONAL LEVEL AND RESPONSIBLE PARTY.

If you are unsure of the appropriate Functional Level, please refer to the attached Functional Level Reference Guide or see your supervisor.

BOARD MEMBER SECRETARY SCANNING PROTOCOL

Scan Out

- When an ROP leaves your desk, scan it to the location/person where you are sending it.

  – When forwarding an ROP to a Board Member for adjudication, scan it to that Board Member's office.

  – When you have completed revisions on a blue-slipped case, scan the ROP back to the Board Member who requested the revision.

  – When moving a signed case to the SIGNED CASES credenza, scan it to the credenza.

  – When handling greenslips: Tower: Scan the greenslipped ROP to the assigned staff attorney and forward ROP to the greenslip credenza. Building One: scan the greenslipped ROP to the assigned staff attorney and forward the ROP to the team leader. For J-panel paralegals: scan and send the greenslipped ROP to the paralegal supervisor.

  – When forwarding an ROP to a Senior Legal Advisor or attorney manager (other than through a greenslip), scan the ROP to the Senior Legal Advisor or manager to whom you are sending it.

  – When forwarding an ROP to the Clerk's Office, scan it to the appropriate Clerk Office team and team leader.

  – When forwarding an ROP to another building, scan it to the appropriate person/location.

Scan In

- When receiving an ROP, scan it to yourself.

  – When a Board Member returns an ROP to you for quick revision (blue slip), scan it to yourself.

  – When moving an ROP from one Board Member's office, if you are not ***IMMEDIATELY*** scanning to another Board Member, scan it to yourself.

When leaving for the day, any ROP remaining on your desk must be scanned to you.

SCANNING REQUIRES CORRECT INPUT OF BOTH FUNCTIONAL LEVEL AND RESPONSIBLE PARTY.

If you are unsure of the appropriate Functional Level, please refer to the attached Functional Level Reference Guide or see your supervisor.

PARALEGAL SCANNING PROTOCOL

Scan Out

- When an ROP leaves your desk, scan it to the location/person where you are sending it.

  – When sending a case for typing or revision, scan it to the Supervisory Legal Assistant who handles paralegal cases.

  – When placing a case into circulation for J Panel, scan the ROP to the Supervisory Legal Assistant.

  – When sending a case to the Screening Panel for circulation or reassignment, scan the ROP to the **"Screening Panel / SP In-Box."**

  – When moving a case to your supervisor's desk or forwarding it to anyone, scan it to that person.

  – When returning a case to the Clerk's Office for a quality problem or continued processing, scan it to the appropriate Clerk's Office team and team leader.

  – When forwarding a case to another building, scan it to the appropriate person/location.

Scan In

- When receiving an ROP, scan it to yourself.

  – When you receive a case from the Clerk's Office, scan it to yourself.

  – When you receive a case from a supervisory legal assistant after typing or revision, scan it to yourself.

  – When receiving a case from anyone (Board Member, Clerk's Office, Screening Panel, your supervisor, etc.), scan it to yourself.

Flexiplacers: When you take an ROP home, scan it to your home.
When you return an ROP to the office, scan it to your office.

SCANNING REQUIRES CORRECT INPUT OF BOTH FUNCTIONAL LEVEL AND RESPONSIBLE PARTY.

If you are unsure of the appropriate Functional Level, please refer to the attached Functional Level Reference Guide or see your supervisor.

SENIOR LEGAL ADVISORS/ SENIOR PANEL ATTORNEYS TEAM LEADERS/SUPERVISORY CASE MANAGEMENT SPECIALISTS/MANAGEMENT ASSISTANTS /EXECUTIVE OFFICER STAFF SCANNING PROTOCOL

Scan Out

- When an ROP leaves your desk, scan it to the location/person where you are sending it.

  – This includes all cases you are sending to a Board Member, attorney manager, Executive Officer and staff, case management specialist, management assistant, supervisory legal assistant, staff attorney, legal assistant, Board secretary, Clerk's Office (e.g. cases with Quality Problem Correction Forms), anyone within EOIR, etc.

Scan In

- When receiving a case from a Board Member, attorney manager, Executive Officer and staff, case management specialist, management assistant, supervisory legal assistant, staff attorney, legal assistant, Board secretary, Clerk's Office, or anyone within EOIR, etc., scan it to yourself.

  Note: SPAs and TLS need not scan in green slip cases on the 24th floor credenza. However, any such case that will be taken to your desk, should be scanned to yourself.

  – For the scanning protocol applicable to cases that you may be screening/proposing orders for, refer to the Attorney Scanning Protocol.

SCANNING REQUIRES CORRECT INPUT OF BOTH FUNCTIONAL LEVEL AND RESPONSIBLE PARTY.

If you are unsure of the appropriate Functional Level, please refer to the attached Functional Level Reference Guide or see your supervisor.

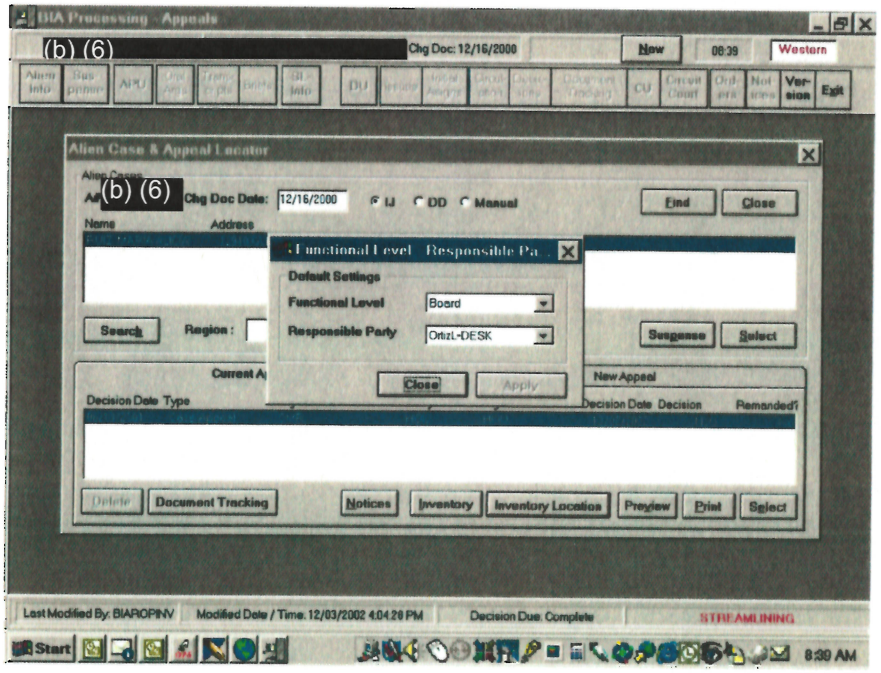
CLERK'S OFFICE SCANNING PROTOCOL

Scan In

When you receive an ROP, scan it to yourself. This means in particular:

- - When you receive an ROP from the Immigration Court in a pending matter, it must be "received" in BIAP and bar coded.

Note: Each person in the Clerk's Office must have the inventory location in BIAP set for his or her location, so the ROP will automatically be scanned to the individual when bar coded. *(See screen shot below)*. The Clerk's Office Team Leaders are responsible for ensuring the functional level and responsible party is set up as the auto default for each member on his or her team.



-- If the ROP is called back from the Court at your request, scan it to yourself when received.

- - In addition, always scan-in the ROP when:
  - -You pull an ROP from a shelf and take it to your desk.
  - -You receive the ROP from anyone in the Clerk's Office
  - -You receive the ROP from the attorney side of the Board
  - -You receive the ROP to set a briefing schedule
  - -You receive the ROP to log in a case
  - -You receive the ROP to send out the Board's decision
  - -You receive the ROP to solve a problem
  - -You receive the ROP to write a letter

Scan Out

When an ROP leaves your desk or work area, scan the ROP to the location (e.g., file cabinet) or to the person to whom you are sending it. This includes, but is not limited to, scanning out when:

- - Sending the ROP to a cabinet.*
- - Sending the ROP to an employee in the Clerk's Office *or anywhere else in BIA (e.g. staff attorney, paralegal, Board Member, etc.)**
- - Sending the ROP to the Immigration Court**
- - Sending the file to any EOIR employee (e.g., FOIA or OGC Unit) outside the Clerk's Office

When you leave for the day, any ROP remaining on your desk must be scanned to you.

* *To ensure speed of processing in a high volume environment, the clerks need not "scan out" when the ROP is pulled, processed, and given to the DDD contractor for scanning and filing in the appropriate cabinet.*

** *Similarly, after a case is "broken down" and the Board's decision is sent out, the ROP is given to a contract worker who scans and returns the file to the Immigration Court within 72 hours.*

SCANNING REQUIRES CORRECT INPUT OF BOTH FUNCTIONAL LEVEL AND RESPONSIBLE PARTY.

If you are unsure of the appropriate Functional Level, please refer to the attached Functional Level Reference Guide or see your supervisor.

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U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals

Chairman

5107 Leesburg Pike, Suite 2400
Falls Church, VA 22041

BIA 04-02

March 5, 2004

MEMORANDUM TO: BIA Board Members

FROM: Lori L. Scialabba
Chairman

SUBJECT: IJ Decisions Imbedded in the Transcripts

Please be advised that pursuant to discussions with OCIJ, and in accordance with our precedent decision in *Matter of A-P-*, 22 I&N Dec. 468 (BIA 1999), the Board, beginning March 4, 2004, should consistently remand all decisions from Immigration Judges in non-detained cases where the IJ's oral decision is embedded in the transcript itself and there is no separate transcribed oral decision in the record. Detained cases of this type should be handled on a case-by-case basis.

As you know, the IJ's oral decision should be a separate item in the record of proceedings (ROP). When the decision is not separate but is imbedded in the transcript, it causes processing problems from the transcription and briefing stages all the way through the process, to the posting of our final decision on the Virtual Law Library (VLL). This is increasingly important now that the Virtual Law Library is used for posting decisions to the Courts and to OIL, as well as being a resource for EOIR and DHS. It is therefore imperative that we have an IJ decision to post, and that we remand the case if we do not. Otherwise, in addition to processing problems noted above, our own electronic records for the case remain deficient, and we receive complaints about the decisions' absence from the VLL.

Consequently, in accordance with our discussions with OCIJ, and pursuant to *Matter of A-P-*, *supra*, we will be instructing our J-Panel paralegals to begin treating these cases consistently as defective transcript cases, as of March 4, 2004. They will be preparing proposed form orders to this effect for Board Member signature when this circumstance arises. Please be aware of this issue when you encounter imbedded IJ decisions.

Thank you.

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5107 Leesburg Pike, Suite 2400
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BIA 04-03

MEMORANDUM TO: Board Legal Staff

FROM: Lori L. Scialabba
Chairman

SUBJECT: Administrative Closure of cases involving TPS or DED countries

The purpose of this memorandum is to provide updated guidance regarding administrative closure of pending appeals at the Board. In particular, appeals which involve aliens who are potentially eligible for Temporary Protected Status (TPS) or Deferred Enforced Departure (DED).

As you are aware, administrative closure is a means in which to temporarily remove a case from either the Immigration Judge's calendar or from the Board's docket. Administrative closure is a case management tool for the Board's administrative convenience and is not meant to provide benefits to either party. The Board has stated that a case may not be administratively closed if opposed by either of the parties. *Matter of Gutierrez*, 22 I&N Dec. 479 (BIA 1996). Moreover, the Board does not, with a few exceptions, administratively close expedited or detained cases, motions to reopen or reconsider or untimely appeals.

In the past, the Board has approved the administrative closure of groups of cases involving nationals who appear eligible for Temporary Protected Status (TPS) or Deferred Enforced Departure (DED). At this time, however, I have concluded that administrative closure of groups of cases is not warranted. Rather, the issue of administrative closure of a case appeal pending at the Board will be made on a case by case basis after evaluating whether:

- alien is eligible to apply for TPS or DED
- a party has affirmatively sought such closure
- no objection from the opposing party has been received

In addition, a listing of countries designated for TPS or DED may be found on the BIA Webpage and the Virtual Law Library.

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Executive Office for Immigration Review

Board of Immigration Appeals

Chairman

5107 Leesburg Pike, Suite 2400
Falls Church, Virginia 22041

BIA 04-04

October 5, 2004

MEMORANDUM TO: BIA Staff

FROM: Lori Scialabba, Chairman

SUBJECT: Standard Operating Procedure: Re-issuance and Amended or Corrected Orders.

Please find attached the BIA standard operating procedure (SOP) for re-issued, amended, or corrected orders. This SOP details the process to be followed only, and does not change any areas of responsibility. Please refer to this SOP when processing re-issued, amended, or corrected orders. This document will be posted on the BIA Web Page for your convenient reference. Thank you.

BIA 04-04
10/04/04
Effective immediately

Special BIA Standard Operating Procedure (SOP) for Vacated and Re-issued Decisions, and Amended or Corrected Orders:

Scope: This SOP sets forth the process to be followed for vacated and re-issued orders and for amended or corrected orders. Portions of this SOP may apply to SPAs, SLAs, team leaders, panel administrative staff, attorneys, paralegals, docket staff, and the Library.

Administration: Questions concerning duties under this SOP should be referred to your supervisor. Other standard operating procedures dealing with re-issuance or amended orders, or with non-associated correspondence and returned decisions, should be amended to conform with the procedures in this SOP. Comments and corrections concerning this SOP should be directed to a senior legal advisor or to the paralegal supervisor.

Authority: 8 CFR §1003.2(a) provides that the Board may reopen or reconsider on our own motion *(sua sponte)* any case in which the Board has rendered a decision.

Occasion: Certain circumstances require that BIA issue a new decision with the same content as a decision we have already rendered (a re-issuance), or with slight modification (an amended or corrected order). This may occur when:

1. Re-issuance: We are ordered by a court to re-issue a decision with a new date to preserve a party's appeal rights *(see note 1)*;
2. Re-issuance: An administrative error has resulted in a defect of service to a party, such as a bad address and returned mail, a lost BIA order, etc.;
3. Amended order: An error in the text of the decision requires correction; or
4. Amended order: Correspondence not previously associated with the file must now be considered, and the order must be amended to reflect this consideration.

Note 1: *Court orders and party requests for re-issuance*: Where a court remands to BIA for re-issuance, refer the matter to senior legal advisor Molly Clark. Where a party *requests* re-issuance, simply forward the ROP to J-Panel with a green J-panel sheet and check the box for "Request to Reissue Board Decision."

Note 2: *Further information*: For further information on handling re-issuance or amended orders involving non-associated correspondence or returned decisions, please refer to the respective SOPs (currently under review) or contact your supervisor. *See:*

i) SOP for Returned Decisions (BIA Web page, Clerk's Office Button, SOPs, Appendix U; *see* http://eoirweb/ccm/bia/biaweb/geninfo/ caseproc/clerk_sop/AppU.htm

ii) SOP for Non-Associated Correspondence, BIA Web page, J-Panel Button, Non-Associated Correspondence box: http://eoirweb/ccm/bia/biaweb/jpanel.html).

PROCESS OVERVIEW / SUMMARY

Under circumstances calling for re-issuance or amended order, the individuals involved in preparing the new decision should acquire the ROP, add a new BIA/MTR proceeding in BIAP, affix the bar code to the existing ROP, and prepare a new proposed order using language set forth below and incorporating by reference the original order. The new signed decision should be posted to the Virtual Law Library with the original version of the decision attached to the new order. For the specific steps in the process, use the following checklist as a guide:

PROCESS IN DETAIL: STEP BY STEP INSTRUCTIONS

I. Determine whether the BIA order was a remand

- ❑ *No remand*: If the original BIA order was not a remand, proceed to section II below.
- ❑ *Remanded but service was defective*: If the original BIA order was a remand and the problem is a defect of service, do not issue a new decision. Instead, route the returned decision to the ROP, in accordance with the BIA Returned Decision SOP (*see* above, page 1, Note 2).
- ❑ *Remanded but there is non-associated correspondence*: If the original BIA order was a remand and the problem is non-associated correspondence, you may not be issuing a new decision. Instead, handle the non-associated document in accordance with the Non-Associated SOP (*see* above, page 1, note 2).
- ❑ *Remanded but the written order is defective*: If the original BIA order was a remand and the problem is a defective order, such as a missing signature or date stamp, or incorrect language, issue an appropriate e-mail to the Immigration Court noting the defect and requesting that the court close out the matter and return the ROP to the Board, pending our issuance of an amended decision. Also, place the request to the court on a "Tickler" system for a follow-up request after one week, in the event we do not receive the ROP by then. Once the ROP is received, proceed to section III below.

II. If the BIA order was not a remand, acquire the ROP

- ❑ Enter the A# in BIAP and click "Document tracking."
- ❑ If document tracking shows the ROP is in on-site storage here at the Board, get the ROP (forward a completed Onsite Storage ROP Request Form to the onsite storage team point of contact, currently Janet Hogg and Pam Elder).
- ❑ If the ROP is not at the Board, but is at the Immigration Court, request it from the Court (Note: Clerk's Office, supervisory legal assistants, case management specialists have standard request language for this). Also, place the motion on a "Tickler" system for a follow-up request to the court after one week, in the event we do not receive the ROP by then.

Note: *DD matters*: Returned decisions pertaining to DD matters should be routed to DHS for handling, per the Returned Decision SOP. This can be found on the intranet BIA page, eoirweb/ccm/bia/biaweb/geninfo/caseproc/clerk_sop/AppU.htm.

III. Add a new proceeding into the BIAP system.

(For this process, *your station must be connected to a bar code printer.* There are bar code printer stations available in the Clerk's Office, on 24th and 19th Floors of the Tower, and on the 7th and 15th floors of Building 1).

- ❑ Go into the BIAP system and type the alien's A#.
- ❑ Click The NEW APPEAL folder.
- ❑ Add a new proceeding under "MTR."
- ❑ Select Motion to REINSTATE *(this will show up on the Case & Appeal Locator screen as* "**MTR BIA REI**"*)* or CASE APPEAL *(for remanded cases that required close-out by the Court).*
- ❑ At the "select an appeal" dialog box, select the most recent BIA decision. This will take you to the Appeal/MTR Tab.
- ❑ Enter today's date in the "Filed on" field.
- ❑ Select "O" for "other," in the appealing party field.
- ❑ Save.
- ❑ An EOIR-26 barcode will print at this point. Discard it. *(You will be using the ROP barcode that prints later in the process.)*
- ❑ Go to the ROP tab.
- ❑ Enter today's date in both data fields: "ROP due on"and "ROP received on."
- ❑ Enter number of tapes "0" and the number of ROPs.
- ❑ Save. (*This will generate the ROP bar code(s), and will automatically scan the ROP to your station.*)

IV. Bar code the ROP (*Your station will need to be connected to a bar code printer as noted in section* III *above*).

- ❑ Affix the new bar code to the ROP, *over the top of the existing bar code.* Make sure the prior proceeding's bar code is completely covered.

V. Complete the remaining appeal/motion information in BIAP

- ❑ Go to APU comments. Enter the date, the reason for reopening *sua sponte*, and your initials. (*Example:* "9-17-05: Reopened *sua sponte* to consider R's reply brief. -efk")
- ❑ Save.
- ❑ Click "Briefs" button.
- ❑ Enter today's date in the data-field "DU dispatch to BIA on _____" Save.
- ❑ Go to DU Tab. Enter today's date in three data fields: "Received by BIA"; "Date to screening," and "Date screened."
- ❑ Click "Issues" button.
- ❑ Assign to the attorney who is writing the re-issued or amended decision, and save.

Now the ROP and the BIAP system are ready for the re-issuance or the amended or corrected order.

VI. Create a new proposed Board Decision, using the appropriate language:
Below see appropriate language for: A) a re-issuance order; B) a corrected or amended order, and C) a remand due to significant non-associated correspondence.

[**Note!**: *Automated orders specifically designed for re-issuance, amended, and corrected orders, with insertion points for tailored language, are in our streamlining software. See automated orders **7H** (re-issuance), **7I** (amended, with option for voluntary departure), **7J** (same, no voluntary departure), **7K** (non-associated documents, no change in order necessary) and **7L** (remanded due to non-associated correspondence). If none of the language in the auto orders is adequate to the order you need, use Word Perfect to the following effect*]:

A. For Re-issuance:

❑ For a re-issuance, use the following or similar language (see, e.g., auto order 7H):

"REISSUED DECISION

To correct [here specify reason for the re-issuance], the Board's order of [DATE] in this matter is hereby vacated and the proceedings reinstated upon the Board's own motion. 8 CFR 1003.2(a). A final order in the matter is hereby issued as of this date, incorporating by reference the text of the attached vacated order."

❑ If the original order (which will be attached to the new order, see below) granted voluntary departure, include the following language:

"FURTHER ORDER: The respondent is granted 30 days from this date within which to voluntarily depart the United States under the terms of the Board's prior order, attached hereto."

B. For Corrected or Amended Order:

❑ For a corrected or amended order, use the following or similar language [*see also automated orders # **7I**, **7J**, or **7K***]:

"AMENDED DECISION

To correct an error in our original decision, the Board's order of [DATE] in this matter is hereby vacated and the proceedings reinstated upon the Board's own motion. 8 CFR 1003.2(a). A final order in the matter is hereby issued as of this date, incorporating by reference the text of the attached vacated order, with the following exception: [here specify the correction being made. For example: "in the first full paragraph on page one, the word "China" is hereby corrected to read "India"]."

❑ If the original order (which will be attached to the new order, see below) granted voluntary departure, include the following language:

"FURTHER ORDER: The respondent is granted 30 days from this date within which to voluntarily depart the United States under the terms of the Board's prior order, attached hereto."

C. For Remand

❑ If the amended decision results in a remand - - this may occur because of non-associated correspondence - - use the following language, omitting reference to "final order" and "attached vacated order" *[see automated order # **7L***]:

"PER CURIAM. To correct an error in our original decision, the Board's order of [DATE] in this matter is hereby vacated and the proceedings reinstated upon the Board's own motion. 8 CFR 1003.2(a). Through administrative error, [insert reference to correspondence received] which was received by the Board before the prior order was issued, was not included in the record of proceedings and was not considered. Upon further review [insert appropriate language]. Accordingly, the record is remanded to the immigration court for further proceedings consistent with the foregoing opinion and the entry of a new decision.

VII. Prepare the new decision for Board Member signature (attorney or legal assistant):

- ❑ Staple the new order on top of a copy of the vacated order.
- ❑ Ensure that a new circulation sheet is placed on the file, for the appropriate panel.
- ❑ Fill out the decision code section of the circulation sheet, using decision code "Other" for re-issues. If remanding, use "REM" (case appeal) or "GRN" (motion).
- ❑ The disposition code should be the same code used for the original order, assuming it was correct.
- ❑ Put a note on the circulation sheet: "Re-issuance" or "amended order."

VIII. Forward the proposed decision to a Board Member:

- ❑ Re-issued decisions can generally be routed to any Board Member.

IX. Break down and mail out: (Docket)

- ❑ Enter decision information (e.g., dates, Board Member(s), vote(s), decision and disposition codes) in BIAP as usual. See section VI above for correct decision codes.
- ❑ Record in Decision Comments the reason for the amended order, so that if asked, we understand and can defend our order to outside parties.
- ❑ Staple the new order on top of the vacated order. This is the same for all copies.
- ❑ Prepare the usual transmittal letters. (*There are no special transmittal letters for re-issuance or amended orders*).

X. Post to the Virtual Law Library (VLL) (Library Personnel or C.O. Personnel):

- ❑ Post the newly issued transmittal and order on the VLL, UNDER THE NEW DATE
- ❑ Post the new order in front, *with the old order attached to it.*

BIA
05-01

Memorandum

Subject	
Case Hold - Continuous physical presence end - unsuccessful admission at port of entry	February 3, 2005

To	From
Board Legal Staff	Lori L. Scialabba, Chairman

The en banc Board will be issuing a precedent decision addressing the issue of whether a break in continuous physical presence for purposes of eligibility for section 240A(b) of the Act (cancellation of removal) occurs when an alien, who departs the United States for a short period, is not allowed admission through a port of entry after encountering enforcement authorities. At this time, pursuant to 8 C.F.R. § 1003.1(e)(8)(iii), I am directing that the adjudication time limits (90 day or 180 day) be temporarily suspended in cases which turn on the question of whether there was a break in continuous physical presence for purposes of cancellation of removal where an alien is unsuccessful in obtaining admission at a port of entry. However, cases which may be resolved without reaching the issue of whether there was a break in continuous physical presence are not to be placed on hold. For example, cases where there is no qualifying relative or the Immigration Judge's alternative finding of no exceptional and unusual hardship is supported by the record. Furthermore, cases that involve similar facts as in the Board's holding in *Matter of Romalez*, 23 I&N Dec. 423 (BIA 2002) (voluntary departure from United States, under the threat of deportation, constitutes a break in the respondent's accrual of continuous physical presence for purposes of cancellation of removal), are not subject to this hold and should be resolved pursuant to *Romalez*.

If you have or find a case with this issue, it is essential that you bring the case to the attention of your team leader or SPA so that the adjudication clock may be stopped in BIAP and the case may be placed in designated cabinets in the Tower and Building One.

U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals

Chairman

5107 Leesburg Pike, Suite 2400
Falls Church, Virginia 22041

BIA 05-02

March 23, 2005

MEMORANDUM TO: Board Legal Staff

FROM: Lori L. Scialabba
Chairman

SUBJECT: Background and Security Check Interim Rule
Remand Guidance

Attached please find Board guidance for cases remanded to the Immigration Judge to allow the Department of Homeland Security the opportunity to complete the appropriate background and security checks as required by the interim regulation *Background and Security Investigations in Proceedings before Immigration Judges and the Board of Immigration Appeals* ("Background Check rule"). This interim rule is effective April 1, 2005.

The attached guidance will be posted on the BIA Web Page for your reference. Additionally, if you have questions regarding the Board's implementation of the Background Check Rule, please contact your supervisor.

Background Check Remand Guidance
Board Determines Relief Should be Granted or Affirmed

I. Introduction: An interim regulation entitled, *Background and Security Investigations in Proceedings before Immigration Judges and the Board of Immigration Appeals* ("Background Check Rule"), which is effective April 1, 2005, provides that neither Immigration Judges nor the Board may grant particular forms of relief which allow an alien to remain in the United States without first ensuring that the Department of Homeland Security ("DHS") has completed the appropriate identity, law enforcement, or security investigations or examinations. The results of these checks must have been reported to and considered by the Immigration Judge prior to the issuance of any order granting an application covered by the rule. The regulation also prohibits the Board from issuing a decision affirming or granting relief where background and security checks have not been conducted or the results of prior checks have expired and need to be updated.

A. Covered Forms of Immigration Relief: The following forms of relief are specifically covered by the rule and therefore cannot be granted until DHS completes the necessary background and security checks:

Asylum under section 208 of the Act;
Adjustment of status to that of an LPR under section 209 or 245 of the Act or any other provision of law;
Conditional permanent resident status or the removal of the conditional basis of such status under section 216 or 216A of the Act;
Waivers of inadmissibility or deportability under sections 209(c), 212, or 237 of the Act or other provisions of law;
Cancellation of removal under section 240A of the Act, suspension of deportation under former section 244 of the Act, relief from removal under former section 212(c) of the Act, or any similar form of relief (includes cancellation under NACARA § 203);
Withholding of removal under section 241(b)(3) of the Act or withholding or deferral of removal under the Convention Against Torture;
Registry under section 249 of the Act; and
Conditional grants relating to the above, such as for applications seeking asylum pursuant to section 207(a)(5) of the Act or cancellation of removal in light of section 240A(e) of the Act.

B. Not Covered - Forms of Immigration Relief: The rule does not apply to the granting of voluntary departure applications or to custody redeterminations.

II. Board determines covered form of relief should be granted or affirmed: Where the Board determines relief should be granted or affirmed BUT

> record reveals no checks completed, reported and considered by Immigration Judge ; or
> DHS reports prior checks are no longer current and need updating; and/or
> checks uncover new information bearing on the merits of the application

the Board must remand the record to the Immigration Judge with "instructions" to allow DHS the opportunity to complete and report results of checks.

A. Decision format.

If upon review of a case an attorney or paralegal determines that a covered form of relief should be granted or affirmed, the proposed decision cannot explicitly state that the relief is granted. Rather, the decision should reflect that eligibility for the relief has been established. [*see discussion on suggested decision language*]

B. Background check remand.

A decision remanded for the sole purpose of allowing DHS to complete or update checks MUST contain the background check remand standard FURTHER ORDER language provided below.

> FURTHER ORDER: Pursuant to 8 C.F.R. § 1003.1(d)(6), the record is remanded to the Immigration Judge for the purpose of allowing the Department of Homeland Security the opportunity to complete or update identity, law enforcement, or security investigations or examinations, and further proceedings, if necessary, and for the entry of an order as provided by 8 C.F.R. § 1003.47(h). *See* Background and Security Investigations in Proceedings Before Immigration Judges and the Board of Immigration Appeals, 70 Fed. Reg. 4743, 4752-54 (Jan. 31, 2005).

C. Affirmance without opinion (AWO) order.

Because the Immigration Judge's decision becomes the final agency decision when the Board issues an AWO, such an order is not desirable when affirming an Immigration Judge's decision to grant relief. Instead, a short order approach should be utilized to affirm an Immigration Judge's finding regarding the respondent's eligibility for relief for a covered form of relief.

D. Circulation sheet

The decision code "BCR" should be checked on the backside of the circulation sheet when the sole basis for the remand to the Immigration Court is for background and security checks. The disposition code "Z" should be also be checked. Remember, only one decision code is checked and only one disposition code is checked.

III. Suggested decision language: The Background Check rule does not alter the approach taken by attorneys and paralegals in analyzing a case or preparing a decision. However, as discussed earlier, when the Board determines that a covered form of relief should be granted or affirmed, the proposed decision and order cannot state that the relief is granted or that the Immigration Judge's grant is affirmed. It is on remand, after considering the results of the completed background and security checks that the Immigration Judge will enter the order granting or denying the immigration relief.

Below are some general examples of language which articulate that eligibility for the relief has been established without saying or ordering that the application is granted. In addition to such language, the orders should state that the appeal is "sustained" or "dismissed".

> Based on the foregoing, we find that the respondent has established his/her eligibility for asylum, and that he/she merits relief as a matter of discretion.
>
> The Board finds no reason to disturb the Immigration Judge's finding that the respondent's qualifying relatives would experience exceptional and extremely unusual hardship. [cites]. Therefore, based upon the record before us, the respondent merits relief as provided by section 240A(b) of the Act.
>
> We find that the respondent has established eligibility for withholding of removal under section 241(a)(3) of the Act.

In addition, attorneys and paralegals may elect to explain at the conclusion of the proposed Board decision why the matter is being remanded to the Immigration Judge, i.e., because the record does not reveal that the required background and security checks were completed during the proceedings.

U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals

Chairman

5107 Leesburg Pike, Suite 2400
Falls Church, Virginia 22041

BIA 05-03

March 28, 2005

MEMORANDUM TO: Board Members
Board Legal Staff

FROM: Lori L. Scialabba
Chairman

SUBJECT: Revised Circulation Sheets and Instructions

Attached you will find a copy of both the merits and screening panel circulation sheets. This memorandum explains the revised forms and provides information for properly completing either circulation sheet. The new circulation sheets will be effective **April 1, 2005, and they will supersede all prior circulation sheets and related memos.**

In general, a circulation sheet serves many purposes. It allows Attorneys and Board Members to communicate case related information. It also enables the Docket Team in the Clerk's Office to record important data regarding the disposition of each case, for example, the decision and disposition codes.

It is very important that Attorneys and Paralegals accurately designate the appropriate decision and disposition codes. Certain recorded data is used by the Immigration Courts to schedule hearings for the respondent or proceed with existing scheduled hearings. The selection of the wrong decision or disposition code can lead to the loss of valuable time and resources for both the Court and Board personnel in trying to correct wrong codes. Moreover, recorded data is shared with various components of the Department of Homeland Security, who in turn use our decision and disposition code data to make determinations regarding the benefits that aliens may be entitled to receive as well as to take action to remove aliens from the United States. Therefore, I must again stress the importance of accurately completing a circulation sheet.

If you have any questions about which codes should be used in a particular case, please contact your Team Leader.

I. MERITS PANEL CIRCULATION SHEET - FRONT SIDE

Instructions For Board Members:

A. Initials & Date Box - After reviewing the drafted decision, Board Members should place their initials next to their names, followed by the date. This informs the Board Member secretaries that the decision has been reviewed and may either be moved to another Board Member or sent to the Clerk's Office for processing. Moreover, the Clerk's Office will not process the case/motion unless the Board Member(s) vote has been recorded.

B. Vote - Board Members should indicate "Yes" if they accept the decision, or "No" if they do not agree with the decision as drafted.

C. SOP - Board Members should indicate "Yes" if they anticipate writing a separate opinion, or "No" if no separate opinion will be submitted.

D. Index - If the Board Members believes that the decision should be Indexed, the Board Member should place a check in the Index box.

E. Special Instructions To Docket - This section should be used to bring any special processing instructions to the attention of the Clerk's Office Docket Team. For example, to request that a courtesy copy of the decision be sent to an attorney.

F. Case Comments - After reviewing the decision, Board Members may make comments regarding the drafted decision to other Board Members for their consideration. Comments should be clear and legible.

Instructions For Attorneys and Paralegals:

A. Recirculate Box - This box should be checked if the proposed decision is being recirculated to the Board Member or Panel after revisions. Please remember that any case that is recirculated must be circulated on a new circulation sheet and must have the previous circulation sheet, comments and decision attached to it (folded printed side out and stapled to the circulation sheet(s) so that it can be unfolded and read without unstapeling). Furthermore, prior drafts of the Board's decision should have the front page crossed out in order to avoid confusion as to which draft is the final decision and order to be mailed out to the parties by the Clerk's Office.

B. A# and Name - The Alien(s) name and alien registration number(s) should be filled in on the circulation sheet. If there is more than one alien and the decisions are not the same for all the aliens involved in the proceedings, separate circulation sheets must be filled out in order to reflect the different decision and disposition codes.

C. Attorney/Paralegal - The Attorney or Paralegal who prepared the decision should place his or her initials next to the Attorney/Paralegal box, followed by the date. This advises the Board Members as well as the Supervisory Legal Assistant or Legal Assistant that the order is ready for review by the Panel.

D. Index Box - If the Attorney or Paralegal believes that the drafted decision should be indexed, place a check in the appropriate box. Moreover, please provide a short explanation of why the drafted decision is appropriate for indexing.

E. Special Instructions To Docket - This section should be used to bring any special processing instructions to the attention of the Clerk's Office Docket Team. For example, to request that a courtesy copy of the decision be sent to an attorney.

F. Case Comments - This section should be used to bring substantive issues related to the draft decision to the attention of the Board Members. Comments should be clear, concise and legible. If more room is necessary, prepare a separate memo, with the alien's name and alien registration number, to be attached to the circulation sheet.

G. Purple or Orange Dot - Single Board Member decisions must have either a purple or orange dot placed on the circulation sheet. Purple dots are used when a single Board Member decision is prepared using a WordPerfect only order. Orange dots should be used for automated orders (or substituted WordPerfect version of the automated order where the order has been "approved" in CASE by the Attorney or Paralegal).

II. SCREENING PANEL REVIEW AND CIRCULATION SHEET - FRONT SIDE

Instructions For Board Members:

A. Special Instructions To Docket - This section should be used to bring any special processing instructions to the attention of the Clerk's Office Docket Team. For example, to request that a courtesy copy of the decision be sent to an attorney.

B. Case Comments - After reviewing the decision, Board Members may make comments regarding the drafted decision to other Board Members for their consideration. Comments should be clear and legible.

C. Approval of Proposed Order (Single Board Member) - Where the Board Member approves of the proposed order, the Board Member should mark the box "Yes" as well as place his or her initials, followed by the date on the provided line.

D. Referral for Three-Board-Member-Order - Where the Board Member concludes that the case should be referred for Three-Board-Member review, the Board Member should mark the appropriate box, as well as place his or her initials, followed by the date on the provided line.

E. Greenslip - Where the Board Member concludes that revisions are required, the "See Greenslip" box should be marked and the corresponding greenslip should be completed and returned with the ROP to the Attorney or Paralegal. The Board Member should also place their initials, followed by the date on the provided line.

Instructions For Attorneys and Paralegals

A. Attorney/Paralegal - The Attorney or Paralegal who prepares the decision should place their initials in the designated box, followed by the date. This advises the Board Member as well as the Screening Panel support staff that the order is ready for review by the Board Member.

B. Name and A# - The Alien(s) name and alien registration number(s) should be filled in on the circulation sheet. If there is more than one alien and the decisions are not the same for all the aliens involved in the proceedings, separate circulation sheets must be filled out in order to reflect the different decision and disposition codes.

C. Type of Order - The Attorney or Paralegal who prepared the decision should mark the appropriate box designating the type of order being circulated, i.e., Auto Order #; Customized Auto Order; WordPerfect Order. When an Auto Order or Customized Auto Order has been used, the designated order number should also be recorded on the provided line.

D. Special Instructions to Docket - This section should be used to bring any special processing instructions to the attention of the Clerk's Office Docket Team. For example, to request that a courtesy copy of the decision be sent to an attorney.

E. Comments/Analysis - This section should be used to bring substantive issues related to the draft decision to the attention of the Board Members. Comments should be clear, concise and legible. If more room is necessary, prepare a separate memo, with the alien's name and alien registration number, to be attached to the circulation sheet.

III. MERITS AND SCREENING PANEL CIRCULATION SHEETS - BACKSIDE

A. Decision Codes - The circulation sheet is used by the Clerk's Office Docket Team to process and close out a case once the decision has been approved by the Board Member(s) and signed. The decision code is used not only to indicate the result of the case, but also to provide data to the Immigration Court, DHS, social service agencies, and Congress. Therefore, Attorneys and Paralegals must circle the appropriate decision code on the back of the circulation sheet.

Only **one** decision code in the Four Groups listed below may be selected. Therefore, it is important to select the single code that most correctly reflects the specific decision in each case.

Group I - This group generally applies to case appeals, bond appeals, DD appeals, and appeals of denials of Immigration Judge motions.

SUS This code applies when the appeal is sustained, that is, the appealing party prevails.

DIS This code applies when the appeal is dismissed, that is, the appealing party does not prevail, and the decision of the Immigration Judge or District Director stands.

DVD This code applies when the decision dismisses the appeal, but contains a FURTHER ORDER granting voluntary departure. This codes also applies if the Board reinstates voluntary departure.

SAF This code applies when the Board affirms without opinion the decision of the Immigration Judge or DHS officer as provided at 8 C.F.R. § 1003.1(e)(4). Note: This code is automatically downloaded to the database when the Auto Order 47B series is selected and approved through the Streamlining software.

SAV This code applies when the Board affirms without opinion the decision of the Immigration Judge as provided at 8 C.F.R. § 1003.1(e)(4), but further grants voluntary departure. Note: This code is automatically downloaded to the database when the Auto Order 47AA series is selected and approved through the Streamlining software.

SUD This code applies when an appeal is summarily dismissed for any of the reasons stated at 8 C.F.R. §§ 1003.1(d)(2)(i)(A)-(H).

Group II - This group generally applies to motions to reopen or reconsider after a final administrative Board order.

DEN This code applies when the motion is denied. This code also applies when a motion is number or timed barred.

GNR This code applies when a motion is granted and the Board disposes of the case **without remanding** the matter to the Immigration Judge or District Director.

Group III - This group is a mixed bag and may apply either to appeals or motions.

BCR This code **MUST** be selected if the sole basis for the remand to the Immigration Court is for background and security checks to be completed or updated by the DHS. For example, the proposed decision provides that the alien is eligible for cancellation of removal, but the record does not reveal that security checks have been reported to the Immigration Judge by DHS.

NOTE: It is very important to select this code when the case is being remanded for the purpose of allowing DHS the opportunity to complete or update background and security checks. If not selected, the Immigration Court will not be able to properly process the case.

REM This code must be selected if ANY part of the decision, other than for background or security checks, remands the case to the Immigration Court or District Director.

NOTE: It is very important to select this code when the case is being remanded for any purpose other than for background and security checks. If not selected, the Immigration Court will not be able to properly process the case.

NJU This code applies where the Board lacks jurisdiction to review the merits of the appeal or motion. For example, this code is used when an alien files a direct appeal of an *in absentia* order, or an appeal is untimely.

CPC This code applies when asylum is granted on a conditional basis based upon Coercive Population Control Policies (a final administrative order). This code also applies when the decision is dismissing a DHS appeal of an Immigration Judge's grant of asylum on a conditional basis. There are automated SAV or WDL orders that write a CPC code into the system.

WDL This code applies when an appeal or motion is withdrawn.

TER This code applies when the Board's decision results in the proceedings being terminated because deportability or alienage has not been established. In this regard, the alien is not subject to exclusion/deportation/removal proceedings. Some other examples include when an alien is deceased; DHS adjusts the alien's status to that of a lawful permanent resident; or the alien is granted US citizenship by DHS. However, this code should **not** be selected when an application for relief is granted, for example, asylum.

MBD This code applies either (1) when a bond appeal is dismissed as moot based on *Matter of Valles*, 21 I&N Dec. 769 (BIA 1997)(while an appeal is pending from IJ's bond redeterminatin decision the IJ renders a 2nd bond redetermination); (2) when the primary issue in the alien's deportation or removal proceeding is decided by the Board or IJ (administratively final decision); or (3) where alien departed the United States (no longer considered in DHS custody).

OTH This code applies only when none of the other codes accurately reflect the outcome of the case.

Group IV - Miscellaneous group - These codes should generally not be selected unless specifically instructed to do so.

CON This code applies when proceedings are being continued indefinitely. Currently, this code is being used for cases that are administratively closed because of repapering eligibility.

DED This code applies to cases that are administratively closed because the alien is subject to deferred enforced departure through Presidential Order.

TPS This code applies to cases administratively closed because the Attorney General has granted Temporary Protected Status to aliens of this nationality.

B. Disposition Codes

The disposition codes are used to determine whether the alien is or is not under an administratively final order of exlcusion/deportation/removal. Unlike the decision codes, which provide information about the nature of the decision, the disposition codes provide information to other government agencies regarding whether the alien is subject to removal. Therefore, in addition to designating a single decision code, attorneys and paralegals must also circle one of the following disposition codes.

Y This should be selected if the proposed order would subject the alien to an administratively final order of exclusion/deportation/removal with no voluntary departure or would leave such a preexisting order in effect. For example, this category would include initial orders of exclusion/deportation/removal where no relief of voluntary departure is granted; all subsequent orders denying an alien's motion to reopen or reconsider. Additionally, this code should also be selected for asylum or withholding only proceedings. This code is also selected when the only form of relief granted is withholding of removal or withholding or deferral under CAT.

N This could should be selected in all exclusion/deportation/removal cases where the alien is not or is no longer excludable/deportable/removable. This would include cases where relief is granted or the proceeding are terminated, proceedings are reopened or reconsidered or no order of removal is entered. This would also include conditional asylum grants based on Coercive Population Control Policies (CPC). Additionally, this code is used for case appeals that are administratively closed, such as a continuation of a case indefinitely (CON), Deferred Enforced Departure (DED), or Temporary Protected Status (TPS) orders.

Z This code should be selected for proceedings where there is no decision on deportability or relief from removal such as when the case is remanded (BCR or REM decision codes). Also applies to visa petitions, fine proceedings, bond proceedings, rescission cases, interlocutory appeals, and recognition and accreditation cases, since these proceedings would not result in an order of exclusion/deportation/removal for the alien.

V This disposition code should be selected for cases where the alien has been granted voluntary departure by the Immigration Judge, but is otherwise subject to being deported/removed.

If you have any questions about which decision or disposition code should be used in a particular case, please contact your Team Leader.

Attachments

Memorandum

BIA 05-04

Subject	Date
Grants of Asylum Based on Coerced Population Control Policies (CPC)	June 30, 2005

To	From
Board Legal Staff	Lori L. Scialabba Chairman

This memorandum concerns the impact of provisions of the REAL ID Act on our processing of cases. **As of May 11, 2005, the Board should no longer be granting asylum conditionally based on coercive population control policies, but we must continue to circle the CPC code on the circulation sheet when the Board's decision results in a grant of asylum based on CPC, if the background checks are complete.**

Section 101(g)(2) of the Real ID Act amends the Immigration and Nationality Act, in particular, by repealing section 207(a)(5), which imposed a numerical cap on the number of asylum grants based on persecution for resistance to coercive population control policies. This amendment took effect on May 11, 2005, subject to the requirements for background security investigations performed by the Department of Homeland Security.

However, while the Real ID Act eliminated the cap of no more than 1,000 asylum grants per fiscal year based on CPC, it did not eliminate the yearly reporting requirements to Congress. EOIR is still required to report to Congress the number of CPC grants issued by the Immigration Judges and the Board per fiscal year.

In the next few weeks, we will report our conditional CPC grants to DHS, who will initiate background security investigations for each alien. As of April 2005, there were approximately 8,400 EOIR conditional grants, and 1,300 USCIS conditional grants, on the waiting list pending final approval. It is crucial that we continue to identify our CPC grants so that those aliens who received conditional asylum grants can receive final approval, and so that we can accurately make our yearly report to Congress.

Those attorneys who have potential CPC grants in this part of the fiscal year will receive a report of their cases shortly. Please take a few moments to review the report and annotate the list to verify whether these cases were asylum grants based solely on coercive population control policies. Add any such cases not included on the report.

Remember, CPC grants may include orders withdrawing appeals or dismissing a DHS appeal (even as untimely) from an Immigration Judge's order granting asylum based on CPC. A CPC grant could also result from a summary affirmance decision. There is an automated summary affirmance order that writes in a CPC code to the system. Please be sure to choose the correct order and the correct codes.

Since April 1, 2005, when the background check rule took effect, we have not been using the CPC code because we have not had indication in the record that DHS has completed all required identity or security investigations.

Until there is such indication in the record, please continue to remand to the Immigration Court cases where the alien establishes eligibility for asylum based on CPC, in order to allow DHS to complete or update the background checks. Do not use the CPC code in that instance. Rather, please use the BCR code with a Z disposition code.

Thank you and please feel free to contact Ana Mann at 703-605-0318 if you have any questions.

Memorandum

BIA 05-05

Subject	Date
Expansion of Case Hold - *Matter of C-Y-Z-* Court of Appeals - Second Circuit	August 30, 2005

To	From
Board Legal Staff	Lori L. Scialabba, Chairman

The Court of Appeals for the Second Circuit has recently remanded three cases to the Board to explain our rationale in *Matter of C-Y-Z-*, 21 I&N Dec. 915 (BIA 1997) (an alien whose spouse was forced to undergo an abortion or sterilization procedure can establish past persecution on account of political opinion and qualifies as a refugee within the definition of section 101(a)(42) of the Act), and to determine whether non-married partners may be eligible for asylum. *See Lin v. Gonzales*, 416 F.3d 184 (2nd Cir. 2005). Currently, cases which turn on the question of whether our holding in *Matter of C-Y-Z-* extends to traditional or customary marriages are placed on HOLD (temporary suspension of the 90 day or 180 day adjudication clock). However, in light of the Court of Appeals remand, I am directing the expansion of the current hold to include cases arising out of the **Second Circuit** that involve the issue of whether an alien can establish past political persecution based upon forced abortion or sterilization of a spouse or non-married partner.

Please remember that if the case may be resolved without reaching the issue of *Matter of C-Y-Z-* or its extension to traditional or customary marriages, the case is not subject to the hold. For example, cases where a proper adverse credibility determination has been made by the Immigration Judge and would be affirmed by the Board are not subject to the hold. Moreover, since the Court of Appeals for the Ninth Circuit currently recognizes traditional or customary marriages for purposes of establishing eligibility for asylum, cases arising out of the Ninth Circuit are also not subject to the hold. *See Ma v. Ashcroft*, 361 F3d 553 (9th Cir. 2004).

If you have or find a case subject to the *Matter of C-Y-Z-* hold, it is essential that you bring the case to the attention of your team leader or SPA so that the adjudication clock may be stopped in CASE, and that the ROP may be placed in designated cabinets.

Memorandum

BIA 06-01

Subject	Date
Case Hold - Effect of departure to Canada to obtain refugee status on removal proceedings	February 16, 2006

To	From
Board Legal Staff	Lori L. Scialabba, Chairman

Immigration Judges have reached inconsistent rulings with respect to the issue of whether an alien is subject to removal under section 237(a)(1)(B) of the Act (overstay charge), as a result of the alien's "departure" from the United States to Canada during the course of proceedings in order to seek protection as a refugee in Canada. On December 13, 2005, the en banc Board examined this issue, and requested that Panel One conduct further inquiry to address (1) the applicability of section 237(a)(1)(B) overstay charge of removability to an alien who has departed the United States during the course of proceedings, and (2) what status should be accorded an alien returned by Canada to the United States after an unsuccessful attempt to obtain refugee status in Canada, i.e., should the alien be returned to the status of an alien facing overstay charges in removal proceedings? Panel One is now in the process of scheduling oral argument to consider these questions.

Accordingly, pursuant to 8 C.F.R. § 1003.1(e)(8)(iii), I am directing that the adjudication time limits (90 day or 180 day) be temporarily suspended in cases which involve aliens who traveled from the United States to Canada to seek a refugee determinations and the applicability of various charges (especially overstay charges) to such aliens who may remain in or be placed in removal proceedings, regardless of whether they have or have not been returned by Canada under the Reciprocal Agreement. If you have or find a case involving this circumstance, it is essential that you bring the case to the attention of your team leader or SPA so that the adjudication clock may be stopped in CASE, and that the ROP may be placed in designated cabinets.

U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals

Chairman

5107 Leesburg Pike, Suite 2400
Falls Church, Virginia 22041

September 19, 2006

BIA 06-02

MEMORANDUM TO: Board Legal Staff

FROM: Lori Scialabba
Chairman

SUBJECT: Decision Review Policy and Procedure

This memorandum addresses the Board's policy and procedure regarding quality review of signed decisions prior to final docket completion.

As you may know, there is a process for reviewing signed Board decisions before they are issued. This process was established pursuant to the Chairman's regulatory authority to make internal policy for the Board. *See* 8 C.F.R. § 1003.1(a)(2). Quality assurance is crucial to the integrity of the Board's decision making process and its reputation in the federal courts and the wider immigration law community. Review of signed Board decisions prior to issuance is an effective way to ensure quality, and I have instructed the Board's attorney management team to conduct decision review on a daily basis.

Decision review is intended to prevent errors, both substantive and procedural; to identify issues that are inconsistent among panels or that need to be addressed by the *en banc* Board; to provide ongoing feedback to managers, Board Members, and staff; and to serve as a source of referral to the Board's decision bank. Decision review also alerts the management team to problem issues. The Attorney General has conveyed his interest in and insisted upon attention to improving decision quality.

1. Decision Review Process

Attorney managers (Senior Legal Advisors, Senior Panel Attorneys, and Attorney Team Leaders) conduct a legal and decision/disposition code review of a large sampling of decisions that docket has placed in the "to be reviewed" shelf in the clerk's office. When a reviewer discovers a possible panel inconsistency, a missed issue, a possible violation of a Board policy, or possible legal error, the ROP is returned to the Senior Counsel to the Chairman for review. If the Senior Counsel agrees that there may be a problem, the Senior Counsel will discuss the case with the signing Board Member. Administrative errors such as codes and typos are either corrected by the attorney manager, or the ROP is returned to the

Team Leader for correction. These errors, and cases that present issues of interest, possible inconsistencies, or cases that should be referred to the decision bank, are recorded in a daily report and are e-mailed to the review team.

The Docket Team or Appeals Examiners conduct an administrative quality review of all decisions and circulation sheets prior to copying them for mail-out. Errors detected by the docket team are returned, with the ROP, for further review by the paralegals and panel administrative staff.

Attorney and paralegal team leaders provide feedback to staff attorneys and paralegals regarding errors noted in the daily decision review reports. This feedback is an important part of the Board's training efforts because it addresses and corrects problems on an ongoing basis. A Senior Legal Advisor collects the daily reports, and periodically provides feedback to the review team.

The attorney manager decision review team reviews all three-Board member cases, and a sampling of the one-Board member cases. The scope of the legal review varies from around 40% to 70% of the case completions per day. The scope of administrative review is 100% of the case completions per day.

II. Substance of Review

A. Legal Errors

The Decision reviewers look for the following according to their best judgment, and either report the issue, or process the case as described above:

- Obvious errors in legal analysis, including failure to apply new precedent or law or citing an incorrect standard of review;
- Actual or potential inconsistencies among Board Members and panels;
- Decisions by Immigration Judges with a history of inappropriate conduct or judgment to ensure that the Board has addressed any inappropriate conduct raised by the parties;.
- Failure to address material appellate arguments;
- Failure to address remand motions or evidence submitted on appeal;
- Inappropriate or problematic use of affirmance without opinion;
- Decisions that should be referred to the decision bank because the treatment of an issue is particularly well drafted or the case addresses an unusual issue;
- Any other problems, as appropriate.

B. Procedural Errors

The following is a list of the most common procedural errors that the attorney reviewers look for, but is not exclusive:

- Typographical errors. The Board should not knowingly issue decisions with typographical errors. These errors are sloppy and reflect poorly on the Board's professionalism.
- Code errors, which are important for tracking the disposition of the case for both the Board and other interested agencies;
- Errors in the "Order" language, including voluntary departure reinstatement orders;
- Late-arriving documents placed in the ROP but not considered;
- Three-Board Member cases whose regulatory deadlines are not changed in CASE;
- Cases where voting was not complete.

III. Conclusion

I am confident that the Board's work product is excellent. We must nevertheless make every effort to ensure that our decisions are consistently of a high quality. Decision review can only catch errors in a sampling of cases. The primary responsibility for the Board's quality and reputation begins with you in the review, analysis and drafting stage.

Memorandum

BIA 06-03

Subject	Date
Case Holds Lifted - Matter of CYZ (traditional or customary marraiges) and Canadian departure	September 19, 2006

To	From
Board Legal Staff	Lori L. Scialabba, Chairman

As a result of the publication of *Matter of S-L-L-*, 24 I&N Dec. 1 (BIA 2006), the existing hold (temporary suspension of the adjudication time limits) on cases involving the question of whether the Board's holding in *Matter of C-Y-Z-*, extends to traditional or customary marriages is lifted. You should resume normal case adjudication on this issue. Cases that were placed in designated cabinets pending the publication of *Matter of S-L-L-* shall be returned to the panels for adjudication.

In addition, the hold on cases involving aliens who traveled from the United States to Canada to seek a refugee determination and the applicability of various charges (especially overstay charges) to such aliens who may remain in or be placed in removal proceedings, regardless of whether they have or have not been returned from Canada under the Reciprocal Agreement is also lifted.

Memorandum

BIA 06-04

Subject	Date
US Supreme Court to consider issue of whether state drug crime an aggravated felony	September 28, 2006

To	From
Board Legal Staff	Lori L. Scialabba, Chairman

As you may be aware, the United States Supreme Court on Tuesday, October 3rd, will hear oral argument in two cases involving the issue of whether a state felony drug conviction that would be classified as a misdemeanor under federal law is an "aggravated felony" for purposes of immigration laws and sentencing purposes. *See Lopez v. Gonzales*, 126 S.Ct. 1651, 164 L. Ed. 2d 395, 74 U.S.L.W. 3559 (April 3, 2006) (No. 05-547); *Toledo-Flores v. United States*, 126 S.Ct. 1651, 164 L. Ed. 2d 395, 74 U.S.L.W. 3559 (April 3, 2006) (No. 05-7664). The Eighth Circuit Court of Appeals, in *Lopez v. Gonzales*, 417 F.3d 934 (8th Cir. 2005), determined that the South Dakota felony drug conviction for aiding and abetting the possession of a controlled substance is an aggravated felony even though the offense would only have qualified as a misdemeanor under federal law. The Fifth Circuit, in *United States v. Toledo-Flores*, 149 Fed. Appx. 241(5th Circuit), determined that a prior state felony conviction for simple possession of a controlled substance qualified as an aggravated felony for sentencing purposes even though the same crime is a misdemeanor under federal law. The Fifth Circuit's holding is in conflict with other Circuit Court interpretations.

Pending the Supreme Court's determination, the Eighth and Fifth Circuits' holdings are binding precedent in cases arising within those circuits. Therefore, if you are assigned a case arising in either the Eighth or Fifth Circuit, which involves the issue of whether a state felony conviction that would be classified as a misdemeanor under federal law is an aggravated felony, please include language either in a footnote or the text of the decision which advises the parties that the Board is aware of the pending issue before the Supreme Court.

Below is some language you are welcome to use for this purpose in the Eighth Circuit:

> "The Board recognizes that the United States Supreme Court is currently considering the issue of whether a state felony drug conviction that would be classified as a misdemeanor under federal law is an "aggravated felony" for immigration purposes. Nevertheless, the Board is bound to apply the Eighth Circuit's analysis as set forth in *Lopez v. Gonzales*, 417 F.3d 934 (8th Cir. 2005), *cert. granted*, 126 S.Ct. 1651 (U.S. April 3, 2006) (No. 05-547), unless the decision is modified or overruled. *Matter of Yanez*, 23 I&N Dec. 390 (BIA 2002)."

With respect to the Fifth Circuit, below is some language that you may wish to use.

> "The Board recognizes that the United States Supreme Court is currently considering the issue of whether a state felony drug conviction that would be classified as a misdemeanor under federal law is an "aggravated felony" for immigration purposes. *See Toledo-Flores v. United States,* 126 S.Ct. 1652, 164 L. Ed. 2d 395, 74 U.S.L.W. 3556 (April 3, 2006) (No. 05-7664); *see also*, *Lopez v. Gonz*ales, 417 F.3d 934 (8th Cir. 2005), *cert. granted*, 126 S.Ct. 1651 (U.S. April 3, 2006) (No. 05-547). Nevertheless, the Board is bound to apply the Fifth Circuit's analysis as set forth in *United States v. Hernandez-Avalos*, 251 F.3d 505 (5th Cir. 2001) and *United States v. Sanchez-Villalobos*, 412 F.3d 572 (5th Cir. 2005), unless the decision is modified or overruled. *Matter of Yanez*, 23 I&N Dec. 390 (BIA 2002)."

If you have any questions, please contact your Team Leader.

Memorandum

BIA 06-05

Subject	Date
DHS motions to hold in abeyance pending US Supreme Court decision - *Gonzales v. Duenas-Alvarez*	October 5, 2006

To	From
Board Legal Staff	Juan P. Osuna, Acting Chairman

On September 26, 2006, the Supreme Court granted the government's petition for *writ of certiorari* challenging the Ninth Circuit Court of Appeals determination that the California offense for unlawful driving or taking a vehicle does not meet the generic definition of a "theft offense" under section 101(a)(43)(G) of the Immigration and Nationality Act. 8 U.S.C. § 1101(a)(43)(G), because it includes accessory or accomplice liability, and therefore criminalizes acts that neither involve "a taking of property or an exercise of control over property." *Duenas-Alvarez v. Gonzales*, 176 Fed.Appx. 820 (9th Cir. Apr 18, 2006) (unpublished, No. 04-74471), *certiorari granted by, Gonzales v. Duenas-Alvarez*, ___ S.Ct.___, 2006 WL 1733804, 75 USLW 3001, 75 USLW 3023 (U.S. Sep 26, 2006) (No. 05-1629). Regarding the *writ of certiorari* filed in *Penuliar v. Gonzales*, 435 F.3d 961 (9th Cir. 2006), *petition for certiorari filed*, 75 USLW 3001 (Jun 22, 2006) (No. 05-1630), which involves the same issue as raised by *Duenas-Alvarez*, the Board has been advised that the Solicitor General asked the Supreme Court to hold their decision until deciding *Duenas-Alvarez*. Oral argument in *Duenas-Alvarez* has been scheduled for December 5, 2006.

As a result of the Supreme Court's action, it is anticipated that, in *Duenas-Alvarez* or *Penulia*-related matters, the Board will continue to receive motions from the Department of Homeland Security ("DHS") requesting that proceedings before us be held in abeyance pending the court's ruling. If you are assigned a case arising out of the Ninth Circuit which contains such a request from DHS, please bring the matter immediately to the attention of your Team Leader or SPA.

Memorandum

BIA 06-06

Subject	Date
CASE HOLD - Second Circuit - persecution claim based on birth of 2nd child in violation of China's family planning policy by a parent from Fujian Province or Changle City	November 17, 2006

To	From
Board Legal Staff	Juan P. Osuna, Acting Chairman

The Court of Appeals for the Second Circuit has remanded a series of cases to the Board which involve a parent's claim of a well-founded fear of sterilization for having two or more children in violation of China's family planning policy. The en banc Board will be addressing and deciding the issues identified by the court. Please see the attached document describing in more detail the issues that the court has asked the Board to address.

Accordingly, pursuant to 8 C.F.R. § 1003.1(e)(8)(iii), I am directing that the adjudication time limits (90 day or 180 day) be temporarily suspended in cases arising out of the **Second Circuit** that involve a claim of well-founded fear of persecution based upon birth of a second child in violation of the family planning policy by a parent from Fujian Province or Changle City. If you have or find a case involving this circumstance, it is essential that you bring the case to the attention of your team leader or SPA so that the adjudication clock may be stopped in CASE, and that the ROP may be placed in designated cabinets.

Attachment

Second Circuit Remands requesting Board address following issues:

1. *Shao v. Board of Immigration Appeals*, 465 F.3d 497 (2d Cir. 2006) -

   Under what circumstances, if any, is having two children in China sufficient grounds for a well-founded fear of future persecution? More specifically, may a parent of "two or more children in China, in apparent violation of China's family planning policies, ...qualify on that basis alone as a 'person who has a well founded fear that he or she will be forced' by the Chinese government 'to abort a pregnancy or to under go involuntary sterilization'."

2. *Guo v. Gonzales*, 463 F.3d 109 (2nd Cir. 2006) -

   What weight should be afforded to the following documents in determining whether a motion to reopen to demonstrate well-founded fear of persecution based on birth of a second child in the United States?

   - 2003 decisions from the Changle City Family-Planning Administration and the Fujian Department of Family-Planning Administration indicating that a foreign-born child will be treated as a Chinese national for purposes for family planning enforcement purposes and that, upon resettlement, Chinese citizens with foreign-born children will be sanctioned according to the family planning rules and regulations as enforced at the local level;

   - a document from 1999 entitled "Q & A for Changle City Family-Planning Information Handbook" stating that sterilization is mandatory upon birth of a second child.

3. *Lin v. United States Dep't of Justice,* — F.3d —, 2006 WL 3060101 (2d Cir. Oct. 30, 2006)

   A. Are the documents referred to in *Guo*, *supra*, authentic?

   B. If so, do they "establish the existence of an official policy, in Changle City or Fujian Province generally, of forced sterilization of parents of two or more children, including parents whose children were born abroad?" (As opposed to Country Reports which find no official policy of forced sterilization).

4. *Chen v. United States Dep't of Justice*, — F.3d —, 2006 WL 3190313 (2d Cir. Nov. 10, 2006)

   "We emphasize that we do not know if the [*Guo*] documents are authentic, and we presume that the BIA's forensic expert are capable of addressing this important threshold question. Until we have an answer, however, we must assume that they are what they are purport to be."

   Chen also submitted a 1995 missive from the Changle City Family Planning Policy Leading Team indicating that some individuals are subject to an official policy of forced sterilization in Changle City and that parents of children born abroad, such as Chen, are subject to the same penalties under the family-planning policy as parents of children born in China. The court asks that the Board "determine the validity, scope and import of these documents, and if they are authentic, reassess Chen's claim in light of them."

Memorandum

BIA 07-01

Subject	Date
CASE HOLD - Asylum Bar Based on Material Support to Terrorist Organizations	January 22, 2007

To	From
Board Legal Staff	Juan P. Osuna /PO Acting Chairman

On January 11, 2007, the Departments of Justice, State, and Homeland Security jointly announced a change in policy that would expand the use of waivers for certain aliens who might otherwise be statutorily barred from asylum and withholding under the Immigration and Nationality Act or the Convention Against Torture, because he or she was found to be inadmissible under section 212(a)(3)(B)(i)(I) of the Act, for having engaged in terrorist activities within the meaning of section 212(a)(3)(B)(iv)(VI)(cc), by providing material support to a designated terrorist organization. The Board is awaiting guidance from the Department concerning implementation of any policy that could affect the Board's decisions.

Accordingly, pursuant to 8 C.F.R. § 1003.1(e)(8)(iii), I am directing that the adjudication time limits be temporarily suspended in individual cases where the Immigration Judge found, or DHS is arguing, that the respondent is barred from asylum on the basis of having provided material support to a terrorist organization. If you come across a case with this issue, please bring it to the attention of a Team Leader or Senior Panel Attorney so that the adjudication clock can be promptly stopped, and the record may be placed in designated cabinets.

Memorandum

BIA07-02

Subject	Date
Background and Security Check Interim Rule - Board Case Processing Update	March 1, 2007

To	From
Board Legal Staff	Juan Osuna, Acting Chairman

The Board is anticipating that, in a limited number of cases, the Department of Homeland Security ("DHS") will advise the Board that the appropriate security and background checks are "current" (*i.e.*, evidence of an expiration date and that time period has not elapsed). In accordance with the *Background and Security Investigations in Proceedings before Immigration Judges and the Board of Immigration Appeals* (interim) regulation ("Background Check rule"), such cases must include specific language notifying the alien that he or she must contact the appropriate DHS office in order to obtain status documents. 8 C.F.R. § 1003.47(i). If you are assigned a case where security checks are "current" (*i.e.*, expiration date provided by DHS and time period has not elapsed), you **must** bring the matter to the attention of your Team Leader or Senior Panel Attorney for further review for inclusion of the approved notice language.

It is important to note, that although there may be a few cases where the Board may outright grant relief as opposed to issuing a BCR remand, the Board's policy of presuming that previously reported checks have expired remains in effect. If you have any question as to whether checks have expired in your assigned case, please make the appropriate inquiries with your Team Leader or Senior Panel Attorney. The Board must comply with the requirements of the Background Check rule as discussed in the attached memorandum which was issued on October 24, 2005. Moreover, the Board must also comply with the permanent injunction order entered by United States District Court of California in the *Santillan* class action suit (slip opinion published at 2005 WL 3542661 (N.D. Cal. Dec. 22, 2005). With this in mind, it is very important to remember the following processing procedures:

(1) Where the Board determines that relief should be granted or affirmed, but the record of proceedings does not reveal that checks have been completed, or DHS reports that the results of prior checks are no longer current, the Board **must** remand the record to the Immigration Judge;

(2) A decision remanded for the sole purpose of allowing DHS to complete or update checks must contain the background check remand standard FURTHER ORDER language, and the circulation sheet must have the decision code "BCR" selected;

(3) At this time, the Board presumes that previously reported and considered checks have expired. The record therefore **must** be remanded to the Immigration Judge for the purpose of updating checks and further consideration where appropriate. Moreover, such orders must contain the background check remand standard FURTHER ORDER language, and the circulation sheet must have the decision code "BCR" selected;

(4) Only in cases which affirmatively reflect that reported and considered checks have not expired, (*i.e.*, expiration date provided to the Board and time period has not elapsed), will the Board consider issuing an order explicitly granting relief covered by the Background Check Rule. However, such a case **must** include specific language notifying the alien that he or she must contact the appropriate DHS office in order to obtain documentation evidencing status.

Again, if you have a case where there is an affirmative representation by DHS indicating that previously reported security checks are "current", (*i.e.*, expiration date provided DHS and time period has not elapsed), bring the matter to the attention of your Team Leader or Senior Panel Attorney. The case will be reviewed for inclusion of the regulatory required language, NOTICE TO ALIEN TO CONTACT DHS/USCIS. *See* 8 C.F.R. 1003.47(i).

For additional details regarding the Board's implementation of the Background Check rule, please refer to the Background Check Remand Guidance (BIA 05-02) issued on March 23, 2005, which is available on the BIA Web Page at http://eoirweb/ccm/bia/biaweb/bia_index.html.

Attachment

Memorandum

Subject	Date
Background and Security Check Interim Rule - Board Case Processing Reminder	October 24, 2005

To	From
Board Legal Staff	Lori L. Scialabba, Chairman

We have reached the 6 month "anniversary" mark with respect to implementation of the *Background and Security Investigations in Proceedings before Immigration Judges and the Board of Immigration Appeals* (interim) regulation ("Background Check rule"). As a result, this memo is intended as a general reminder of the Board's processes for implementing this rule. For more details, please refer to the Background Check Remand Guidance (BIA 05-02) issued on March 23, 2005, which is available on the BIA Web Page at http://eoirweb/ccm/bia/biaweb/bia_index.html.

The Background Check rule prohibits Immigration Judges and the Board from granting particular forms of immigration relief without first ensuring that the Department of Homeland Security ("DHS") has completed and reported the appropriate identity, law enforcement, or security investigations or examinations. *See* 8 C.F.R. §§ 1003.1(d)(6) and 1003.47(g). The following forms of relief are specifically covered by the rule and therefore cannot be granted until DHS completes the necessary background and security checks:

- Asylum under section 208 of the Act;
- Adjustment of status to that of an LPR under section 209 or 245 of the Act or any other provision of law;
- Conditional permanent resident status or the removal of the conditional basis of such status under section 216 or 216A of the Act;
- Waivers of inadmissibility or deportability under sections 209(c), 212, or 237 of the Act or other provisions of law;
- Cancellation of removal under section 240A of the Act, suspension of deportation under former section 244 of the Act, relief from removal under former section 212(c) of the Act, or any similar form of relief (includes cancellation under NACARA § 203);
- Withholding of removal under section 241(b)(3) of the Act or withholding or deferral of removal under the Convention Against Torture;
- Registry under section 249 of the Act; and

- Conditional grants relating to the above, such as for applications seeking cancellation of removal in light of section 240A(e) of the Act.

The rule, however, does not apply to the granting of voluntary departure applications or to custody redeterminations.

Board Remand to allow DHS to complete or update checks: Where the Board determines relief should be granted or affirmed, but the record of proceedings reveals that checks have not been completed or DHS reports that the results of prior checks are no longer current, the Board must remand the record to the Immigration Judge to allow DHS the opportunity to complete and report the results of checks. The Background Check Remand Guidance (BIA 05-02) issued on March 23, 2005, provides detailed information regarding processing cases remanded to the Immigration Judge for the sole purpose of allowing DHS to complete or update checks.

Remember, that a decision remanded for the sole purpose of allowing DHS to complete or update checks must contain the background remand standard FURTHER ORDER language provided below.

> FURTHER ORDER: Pursuant to 8 C.F.R. § 1003.1(d)(6), the record is remanded to the Immigration Judge for the purpose of allowing the Department of Homeland Security the opportunity to complete or update identity, law enforcement, or security investigations or examinations, and further proceedings, if necessary, and for the entry of an order as provided by 8 C.F.R. § 1003.47(h). *See* Background and Security Investigations in Proceedings Before Immigration Judges and the Board of Immigration Appeals, 70 Fed. Reg. 4743, 4752-54 (Jan. 31, 2005).

In addition, the proposed decision should not explicitly state that the relief is granted. Rather, the decision should reflect that eligibility for the relief has been established. For further specific guidance regarding suggested decision language, please consult the Background Check Remand Guidance (BIA 05-02) which is available on the BIA Web Pate at http://eoirweb/ccm/bia/biaweb/bia_index.html. Finally, the decision code "BCR" should be checked on the backside of the circulation sheet, and the disposition code "Z" should also be selected.

Board Order Granting or Affirming - Notice To Alien To Contact DHS: Only when checks have been completed, results reported and considered, and DHS has not advised that checks have expired or are not required, may the Board issue an order granting relief covered by the Background Check rule. However, the regulation further requires that the decision reflecting the grant **must** include

notice to the alien that, in order to obtain documentation evidencing status, the alien must contact the appropriate DHS office. *See* 8 C.F.R. § 1003.47(i).

At this time, the Board and DHS are working through various issues related to the notification requirement in Board decisions. Further information will be forthcoming regarding implementation of this portion of the Background Check rule. If you have a case where a covered form of relief should be granted or affirmed AND the record reflects that checks have been completed, results reported and considered, and DHS has not advised the Board that checks have expired, please bring the matter to the attention of your Team Leader or Senior Panel Attorney.

U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals

Chairman

5107 Leesburg Pike, Suite 2400
Falls Church, Virginia 22041

BIA 07-03

May 1, 2007

MEMORANDUM TO: Board Members
Board Legal Staff

FROM: Juan P. Osuna JPO
Acting Chairman

SUBJECT: Circulation Sheets and Instructions

The purpose of this memorandum is to explain as well as to provide information regarding the proper completion of the merits and screening panel circulation sheets.

A circulation sheet serves many purposes. It allows Board members and attorneys to communicate case related information. It also enables the docket team in the Clerk's Office to record important data regarding the disposition of each case. Additionally, the circulation sheets are used to track such issues as Immigration Judge conduct and cases which warrant investigation for attorney discipline by EOIR's Office of General Counsel.

It is very important that attorneys and paralegals accurately designate the appropriate decision and disposition codes. Certain recorded data is used by the Immigration Courts to schedule hearings for the respondent or proceed with existing scheduled hearings. The selection of the wrong decision or disposition code can lead to the loss of valuable time and resources for personnel at the Immigration Court as well as at the Board in trying to correct wrong codes. Moreover, recorded data is shared with various components of the Department of Homeland Security, who in turn use our decision and disposition code data to make determinations regarding the benefits that aliens may be entitled to receive as well as to take action to remove aliens from the United States. Therefore, I must again stress the importance of accurately completing a circulation sheet.

If you have any questions about which codes should be used in a particular case, please contact your Team Leader.

I. MERITS PANEL CIRCULATION SHEET - FRONT SIDE

Instructions for Board Members:

A. Initials & Date Box - After reviewing the draft decision, Board members should place their initials next to their names, followed by the date. This informs the Board member secretaries that the decision has been reviewed and may either be moved to another Board member or sent to the Clerk's Office for processing. Moreover, the Clerk's Office will not process the case/motion unless the Board member(s) vote has been recorded.

B. Vote - Board members should indicate "Yes" or "Ok"if they accept the decision, or "No" if they do not agree with the decision as drafted.

C. SOP - Board members should indicate whether they anticipate writing a separate opinion.

D. Decision Bank - If the Board member believes that the decision should be included in the Decision Bank, the Board member should place a check in the Decision Bank box.

E. Special Instructions To Docket - This section should be used to bring any special processing instructions to the attention of the Clerk's Office Docket Team. For example, this section may be used to request that a courtesy copy of the decision be sent to an attorney. This space should not be used to communicate with other Board members or attorneys. However, if positive feedback is provided to the attorney or paralegal in the Comments/Analysis section, the Board member should mark the "Copy of Circulation Sheet to Atty/PL, TL & SPA" box in this section.

F. Comments/Analysis - After reviewing the decision, Board members may make comments regarding the drafted decision and write comments to other Board members for their consideration. Positive feedback to the attorney or paralegal may also be noted in this area. If positive feedback is provided to the attorney or paralegal, the Board member should mark the "Copy of Circulation Sheet to Atty/PL, TL & SPA" box in the Special Instructions To Docket section.

G. IJC - If language in the proposed order addresses the professionalism of the Immigration Judge's conduct in the proceedings below, this notation should be circled. The Docket Team shall enter this data in CASE.

H. AC - This notation relates to egregious conduct of the private attorney in the case and should be circled when the record reveals that the attorney's conduct in representing the alien is of a nature serious enough that it may warrant an investigation by EOIR's Office of General Counsel (OGC). Circumstances which might warrant referral to OGC may be found at 8 C.F.R. § 1003.102.

Instructions for Attorneys and Paralegals:

A. Recirculate Box - This box should be checked if the proposed decision is being recirculated to the Board member or Panel after revisions. When recirculating a case, a new circulation sheet must be used. The previous circulation sheet, comments and prior proposed decision should all be attached to the new

circulation sheet (folded). Furthermore, prior drafts of the Board's decision should have the front page crossed out in order to avoid confusion as to which draft is the final decision and order to be mailed out to the parties by the Clerk's Office.

B. A# and Name - The Alien(s) name and alien registration number(s) should be filled in on the circulation sheet. If there is more than one alien and the decisions are not the same for all the aliens involved in the proceedings, separate circulation sheets must be filled out in order to reflect the different decision and disposition codes.

C. Attorney/Paralegal - The attorney or paralegal who prepared the decision should place his or her initials next to the Attorney/Paralegal box, followed by the date. This advises the Board members as well as the supervisory legal assistant or legal assistant that the order is ready for review by the Panel.

D. Decision Bank - If the attorney or paralegal believes that the drafted decision should be included in the decision bank, place a check in the appropriate box. Moreover, please provide a short explanation of why the drafted decision is appropriate for selection.

E. Special Instructions To Docket - This section should be used to bring any special processing instructions to the attention of the Clerk's Office docket team. For example, to request that a courtesy copy of the decision be sent to an attorney or to indicate that the decision is an interim order.

F. IJC - If language in the proposed order addresses the professionalism of the Immigration Judge's conduct in the proceedings below, this notation should be circled. The Docket Team shall enter this data in CASE.

G. AC - This notation relates to egregious conduct of the private attorney in the case and should be circled when the record reveals that the attorney's conduct in representing the alien is of a nature serious enough that it may warrant an investigation by EOIR's Office of General Counsel (OGC). Circumstances which might warrant referral to OGC may be found at 8 C.F.R. § 1003.102.

H. Comments/Analysis - This section should be used to bring substantive issues related to the draft decision to the attention of the Board members. Comments should be clear, concise and legible. If more room is necessary, prepare a separate memo, with the alien's name and alien registration number, and attach the memo to the circulation sheet.

I. Purple or Orange Dot - Single Board member decisions must have either a purple or orange dot placed on the circulation sheet. Purple dots are used when a single Board member decision is prepared using a WordPerfect only order. Orange dots should be used for automated orders (or substituted WordPerfect version of the automated order where the order has been "approved" in the Streamlining Information of CASE by the attorney or paralegal).

II. SCREENING PANEL REVIEW AND CIRCULATION SHEET - FRONT SIDE

Many of the fields used on the screening panel circulation sheets are similar to those used by merits panels. The descriptions below focus solely on fields unique to the screening panel circulation sheet. For a detailed description of the fields common to both circulation sheets, please refer to those descriptions covered in the merits panel portion of this memorandum.

Instructions for Board Members:

A. Approval of Proposed Order (single Board member) - Where the Board member approves of the proposed order, the Board member should mark the box "Yes" as well as place his or her initials, followed by the date on the provided line.

B. Referral for Three-Board-Member-Order - Where the Board member concludes that the case should be referred for Three-Board-Member review, the Board member should mark the appropriate box, as well as place his or her initials, followed by the date on the provided line.

C. Greenslip - Where the Board member concludes that revisions are required, the "See Greenslip" box should be marked and the corresponding greenslip should be completed and returned with the ROP to the Attorney or Paralegal. The Board member should also place their initials, followed by the date on the provided line.

Instructions For Attorneys and Paralegals

A. Type of Order - The attorney or paralegal who prepared the decision should mark the appropriate box designating the type of order being circulated, i.e., Auto Order #; WordPerfect Order. When an Auto Order has been used, the designated order number should also be recorded on the provided line.

III. MERITS AND SCREENING PANEL CIRCULATION SHEETS - BACKSIDE

The backside of the a circulation sheet is used to record two types of codes: decision and disposition codes. Attorneys and paralegals must only select one decision code and one disposition code for each case.[1] Use a separate circulation sheet for each alien whenever a proposed order results in different decision or disposition code for the aliens addressed in the order. This is important because it reduces the possibility of recording the wrong code. Finally, although an automated order approved through the Streamlining Information section CASE makes the selection of a *decision* code unnecessary, a *disposition* code must always be selected.

Below is a description of the active decision and disposition codes currently used by the Board.

A. Decision Codes - The circulation sheet is used by the Clerk's Office docket team to process and close out a case once the decision has been approved by the Board member(s) and signed. The decision code is used not only to indicate the result of the case, but also to provide data to the Immigration Court, DHS, social service agencies, and Congress. Therefore, attorneys and paralegals must circle the appropriate decision code on the back of the circulation sheet.

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[1] When issuing an interim order, the backside of the circulation sheet does not need to be filled out. "Interim Order" should be written in the **Special Instructions to Docket** section of the front side of the circulation sheet.

Only **one** decision code may be selected. Therefore, it is important to select the single code that most correctly reflects the specific decision in each case.

Group I - This group generally applies to case appeals, bond appeals, DD appeals, and appeals of denials of Immigration Judge motions.

SUS This code applies when the appeal is sustained, that is, the appealing party prevails.

DIS This code applies when the appeal is dismissed, that is, the appealing party does not prevail, and the decision of the Immigration Judge or District Director stands.

DVD This code applies when the decision dismisses the appeal, but contains a FURTHER ORDER granting voluntary departure. This codes also applies if the Board reinstates voluntary departure.

SAF This code applies when the Board affirms without opinion the decision of the Immigration Judge or DHS officer as provided at 8 C.F.R. § 1003.1(e)(4). Note: This code is automatically downloaded to the database when the Auto Order 47B series is selected and approved through the Streamlining software.

SAV This code applies when the Board affirms without opinion the decision of the Immigration Judge as provided at 8 C.F.R. § 1003.1(e)(4), but further grants voluntary departure. Note: This code is automatically downloaded to the database when the Auto Order 47AA series is selected and approved through the Streamlining software.

SUD This code applies when an appeal is summarily dismissed for any of the reasons stated at 8 C.F.R. §§ 1003.1(d)(2)(i)(A)-(H).

Group II - This group generally applies to motions to reopen or reconsider after a final administrative Board order.

DEN This code applies when the motion is denied. This code also applies when a motion is number or timed barred.

GNR This code applies when a motion is granted and the Board disposes of the case **without remanding** the matter to the Immigration Judge or District Director.

Group III - This group is a mixed bag and may apply either to appeals or motions.

BCR This code **MUST** be selected if the sole basis for the remand to the Immigration Court is for background and security checks to be completed or updated by the DHS. For example, the proposed decision provides that the alien is eligible for cancellation of removal, but the record does not reveal that security checks have been reported to the Immigration Judge by DHS or the record does not reveal that the prior reported checks are current.

NOTE: It is very important to select this code when the case is being remanded for the purpose of allowing DHS the opportunity to complete or update background and

security checks. If not selected, the Immigration Court will not be able to properly process the case.

REM This code must be selected if ANY part of the decision, other than for background or security checks, remands the case to the Immigration Court or District Director.

NOTE: It is very important to select this code when the case is being remanded for any purpose other than for background and security checks. If not selected, the Immigration Court will not be able to properly process the case.

NJU This code applies where the Board lacks jurisdiction to review the merits of the appeal or motion. For example, this code is used when an alien files a direct appeal of an *in absentia* order, or an appeal is untimely.

CPG The CPC code was used to designated conditional asylum grants based upon coercive population control policies and has been replaced in CASE by the CPG code. Although the cap placed on CPC grants has been abolished, the requirement to record asylum grants based on coercive population control policies remains. However, until the Board issues grants of relief as opposed to remanding pursuant to the security check rule, the **BCR** code should be selected when the respondent is found eligible for asylum based on coercive population control policies.

Note: The CPG code also applies when the decision is dismissing a DHS appeal of an Immigration Judge's grant of asylum on a conditional basis. There are automated SAV or WDL orders that write a CPG code into the system. However, please keep in mind the requirements of the security check rule as noted above.

WDL This code applies when an appeal or motion is withdrawn.

TER This code applies when the Board's decision results in the proceedings being terminated because deportability or alienage has not been established. In this regard, the alien is not subject to exclusion/deportation/removal proceedings. Some other examples include when an alien is deceased; DHS adjusts the alien's status to that of a lawful permanent resident; or the alien is granted US citizenship by DHS. However, this code should **not** be selected when an application for relief is granted, for example, asylum.

MBD This code applies either (1) when a bond appeal is dismissed as moot based on *Matter of Valles*, 21 I&N Dec. 769 (BIA 1997) (while an appeal is pending from IJ's bond redeterminatin decision the IJ renders a 2nd bond redetermination); (2) when the primary issue in the alien's deportation or removal proceeding is decided by the Board or IJ (administratively final decision); or (3) where alien departed the United States (no longer considered in DHS custody).

OTH This code applies only when none of the other codes accurately reflect the outcome of the case.

Group IV - Miscellaneous group - These codes should generally not be selected unless specifically instructed to do so.

CON This code applies when proceedings are being continued indefinitely. Currently, this code is being used for cases that are administratively closed because of repapering eligibility.

DED This code applies to cases that are administratively closed because the alien is subject to deferred enforced departure through Presidential Order.

TPS This code applies to cases administratively closed because the Attorney General has granted Temporary Protected Status to aliens of this nationality.

B. Disposition Codes

The disposition codes are used to determine whether the alien is under an administratively final order of exlcusion/deportation/removal. Unlike the decision codes, which provide information about the nature of the decision, the disposition codes provide information to other government agencies regarding whether the alien is subject to removal. Therefore, in addition to designating a single decision code, attorneys and paralegals must also circle one of the following disposition codes.

Y This should be selected if the proposed order would subject the alien to an administratively final order of exclusion/deportation/removal with no voluntary departure or would leave such a preexisting order in effect. For example, this category would include initial orders of exclusion/deportation/removal where no relief of voluntary departure is granted; all subsequent orders denying an alien's motion to reopen or reconsider. Additionally, this code should also be selected for asylum or withholding only proceedings. This code is also selected when the only form of relief granted is withholding of removal or withholding or deferral under CAT as DHS may remove the alien to a third country.

N This should be selected in all exclusion/deportation/removal cases where the alien is not or is no longer excludable/deportable/removable. This would include cases where relief is granted or the proceeding are terminated, proceedings are reopened or reconsidered or no order of removal is entered. Additionally, this code is used for case appeals that are administratively closed, such as a continuation of a case indefinitely (CON), Deferred Enforced Departure (DED), or Temporary Protected Status (TPS) orders.

REMINDER - Background Check Rule: Where the Board determines that relief should be granted or affirmed, but the record of proceedings does not reveal that checks have been completed, or checks are no longer current, the Board **must** remand the record to the Immigration Judge - BCR remand. At this time, the Board presumes that previously reported checks have expired.

Z This code should be selected for proceedings where there is no decision on deportability or relief from removal such as when the case is remanded (BCR or REM decision codes). Also applies to visa petitions, fine proceedings, bond proceedings, rescission cases, interlocutory appeals, and

recognition and accreditation cases, since these proceedings would not result in an order of exclusion/deportation/removal for the alien.

V This disposition code should be selected for cases where the alien has been granted voluntary departure by the Immigration Judge, but is otherwise subject to being deported/removed.

If you have any questions about which decision or disposition code should be used in a particular case, please contact your Team Leader.

Memorandum

BIA 07-04

Subject	Date
CASE HOLD - Recidivist State simple drug possession offenses	June 25, 2007

To	From
Board Legal Staff	Juan P. Osuna, Acting Chairman JPO

On June 5, 2007, the en banc Board examined the issue of whether, under *Lopez v. Gonzales*, 127 S.Ct. 625 (2006), a second State drug possession offense committed after the first such offense has become final constitutes an aggravated felony notwithstanding that the second offense did not charge the alien as a recidivist. Panel One has scheduled an oral argument for July 12, 2007, to further consider the matter.

Accordingly, pursuant to 8 C.F.R. § 1003.1(e)(8)(iii), I am directing that the adjudication time limits be temporarily suspended in individual cases **arising out of the Court of Appeals for Second, Fourth, Fifth, Seventh, Eighth, Ninth, Tenth and Eleventh Circuit** that involve the issue of whether a second State drug possession offense committed after the first such offense has become final constitutes an aggravated felony notwithstanding that the second offense did not charge the alien as a recidivist. If you come across a case with this issue, please bring it to the attention of a Team Leader or Senior Panel Attorney so that the adjudication clock can be promptly stopped, and the record may be placed in designated cabinets.

Cases arising out of the First, Third and Sixth Circuits should apply the following applicable precedents:

First Circuit	*Berhe v. Gonzales*, 464 F.3d 74 (1st Cir. 2006)
Third Circuit	*Gerbier v. Holmes*, 280 F.3d 297 (3d Cir. 2002)
Sixth Circuit	*United States v. Palacios-Suarez*, 418 F.3d 692 (6th Cir. 2005)

Memorandum

BIA 07-05

Subject	Date
Case Hold Lifted - Second Circuit - persecution claim based on birth of 2nd child in violation of China's family planning policy by a parent from Fujian Province or Changle City	August 16, 2007

To	From
Board Legal Staff	Juan P. Osuna, Acting Chairman

As the result of the publication of *Matter of S-Y-G-*, 24 I&N Dec. 247 (BIA 2007); *Matter of J-H-S-*, 24 I&N Dec. 196 (BIA 2007) and *Matter of J-W-S-*, 24 I&N Dec. 185 (BIA 2007), the existing hold (temporary suspension of the adjudication time limits) on cases involve a parent's claim of a well-founded fear of sterilization for having two or more children in violation of China's family planning policy is lifted. Cases that were placed in the designated cabinets are in the process of being returned to the panels for adjudication.

Memorandum

BIA07-06

Subject	Date
Case Hold - *Matter of C-Y-Z-* and *Matter of S-L-L-*	September 6, 2007

To	From
Board Legal Staff	Juan P. Osuna Acting Chairman

The Attorney General has recently referred to himself for review the decision of the Board of Immigration Appeals in *Matter of* (b) (6) (BIA February 24, 2006) (unpublished), in which he will examine the issue of whether section 601(a) of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), codified at 8 U.S.C. § 1101(a)(42), is ambiguous or silent on the availability of refugee status for spouses or partners of individuals who have been subjected to forced abortion or sterilization. The Attorney General will also consider whether the Board's interpretation of section 601(a) as set forth in *Matter of C-Y-Z-*, 21 I&N Dec. 915 (BIA 1997) (an alien whose spouse was forced to undergo an abortion or sterilization procedure can establish past persecution on account of political opinion and qualifies as a refugee within the definition of section 101(a)(42) of the Act), and *Matter of S-L-L-*, 24 I&N Dec. 1 (BIA 2006) (affirmed and clarified holding in *Matter of C-Y-Z-*, as well as declined to extend *C-Y-Z-* to traditional or customary marriages), is correct.

Accordingly, pursuant to 8 C.F.R. § 1003.1(e)(8)(iii), I am directing that the adjudication time limits be temporarily suspended in cases, which turn on the question of whether our holding in *Matter of C-Y-Z-* or *Matter of S-L-L-* are controlling. However, since the Court of Appeals for the Second Circuit has overruled *Matter of C-Y-Z-*, and *Matter of S-L-L-*, cases arising out of the Second Circuit are not subject to the hold. *See Lin v. U.S. Dept. of Justice,* ___ F.3d ___, 2007 WL 2032066 (2d Cir. July 16, 2007). In the Second Circuit, please continue to apply *Lin v. U.S. Dept. of Justice, supra.* Moreover, cases which may be resolved without reliance on the holdings in *Matter of C-Y-Z-* or *Matter of S-L-L-*, are not to be placed on hold. For example, cases in which the Board affirms an Immigration Judge adverse credibility determination would not subject to the hold.

If you come across a case with this issue, please bring it to the attention of a Team Leader or Senior Panel Attorney so that the adjudication clock can be promptly stopped, and the record may be placed in designated cabinets.

Memorandum

BIA 07-07

Subject	Date
US Supreme Court to consider issue of whether filing motion to reopen tolls the voluntary departure period, and whether a particularly serious crime must be an aggravated felony	October 31, 2007

To	From
Board Legal Staff	Juan P. Osuna, Acting Chairman

On September 25, 2007, the United States Supreme Court granted petitions for *writ of certiorari* in two immigration related matters. The first matter involves the limited issue of whether the filing of a motion to reopen removal proceedings automatically tolls the period within which an alien must depart the United States under an order granting voluntary departure. *Dada v. Gonzales*, 207 Fed. Appx. 425 (5th Cir. Nov. 28, 2006) (unpublished, No. 06-60180), *certiorari granted by, Dada v. Keisler*, ___S.Ct. ___, 2007 WL 2768022, 76 USLW 3122, 76 USLW 3154. The Court of Appeals for the Third, Eighth, Ninth, and Eleventh circuits have held that the filing of a motion to reopen prior to the expiration of a voluntary departure period has the effect of "tolling" the voluntary departure deadline until such time as the motion is adjudicated. *Ugokwe v. United States Attorney General*, 453 F.3d 1325, 1329-31 (11th Cir. 2006); *Kanivets v. Gonzales*, 424 F.3d 330, 334-35 (3d Cir. 2005); *Sidikhouya v. Gonzales*, 407 F.3d 950, 952 (8th Cir. 2005); *Barroso v. Gonzales*, 429 F.3d 1195 (9th Cir. 2005). The Court of Appeals for the First, Fourth and Fifth have rejected the "tolling" principle. *Dekoladenu v. Gonzales*, 459 F.3d 500, 505-07 (4th Cir. 2006); *Banda-Ortiz v. Gonzales*, 445 F.3d 387, 390-91 (5th Cir.), *petition for reh'g en banc denied*, 458 F.3d 367 (5th Cir. 2006); *Jupiter v. Ashcroft*, 396 F.3d 487, 491-92 (1st Cir. 2005).

The second case in which the Supreme Court granted the petition for *writ of certiorari* involves the issues of whether an offense must be an aggravated felony to be classified as a "particularly serious crime" (PSC) for purposes of the bar to withholding of removal, and the scope of appellate court jurisdiction over review of PSC determinations. *Ali v. Achim*,468 F.3d 462 (7th Cir. 2006), *rehearing and rehearing en banc denied* (Jan. 5, 2007), *certiorari granted*, ___ S.Ct. ___, 2007 WL 1090399, 75 USLW 3557, 76 USLW 3018. The Seventh Circuit Court of Appeals determined that the Immigration and Nationality Act does not require that an offense be an aggravated felony in order to be considered a particularly serious crime. The Board recently held in *Matter of N-A-M-*, 24 I&N Dec. 336, 338 (BIA 2007), that a plain reading of statute does not require that an offense be an aggravated felony in order for it to be considered a particularly serious crime. The Third Circuit, on the other hand, has taken the contrary view, *see Alaka v. United States Att'y Gen.*, 456 F.3d 88, 104-05 (3d Cir. 2006), and the Board has declined to follow the court's position outside the Third Circuit.

Pending the Supreme Court's determination in these cases, the Board will continue to apply controlling circuit or Board precedent. In those circuits that have not addressed the "tolling"of voluntary departure

issue, we will continue to follow the approach that the filing of a motion to reopen does not have the effect of "tolling" voluntary departure. Moreover, as to the PSC issue, apply the Board's decision in *Matter of N-A-M-*. In the Third Circuit apply that court's decision in *Alaka*.

In addition, in the circuits that have spoken on these issues, please include language either in a footnote or the text of the decision that refers to the pending issue before the Supreme Court. Below is some language, which will need to be tailored to the specific controlling circuit, which you are welcome to use for the "tolling" voluntary departure issue:

> "The Board recognizes that the United States Supreme Court is currently considering the issue of whether the filing of a motion to reopen removal proceedings automatically tolls the period within which an alien must depart the United States under an order granting voluntary departure."

With respect to the issue of whether a particularly serious crime must be an aggravated felony for the withholding bar to trigger, below is some language that you may wish to use.

> "The Board recognizes that the United States Supreme Court is currently considering the issue of whether an offense must be an aggravated felony to be classified as "particularly serious crime" for purposes of the bar to withholding of removal."

If you have any questions, please contact your Team Leader or SPA.

Memorandum

BIA 07-08

Subject	Date
Case Hold Lifted - Recidivist State Simple Drug Possession Offenses	December 18, 2007

To	From
Board Legal Staff	Juan P. Osuna, Acting Chairman

As the result of the publication of *Matter of Thomas*, 24 I&N Dec. 416 (BIA 2007) and *Matter of Carachuri-Rosendo*, 24 I&N Dec. 382 (BIA 2007), the existing hold (temporary suspension of the adjudication time limits) on cases that involve the issue of whether a second State drug possession offense committed after the first such offense has become final constitutes an aggravated felony notwithstanding that the second offense did not charge the alien as a recidivist is lifted. Cases that were placed in the designated cabinets have been returned for adjudication.

Memorandum

BIA 08-01

Subject	Date
CASE HOLD - Material Support to Terrorist Organizations	March 18, 2008

To	From
Board Legal Staff	Juan P. Osuna /JPO Acting Chairman

On January 22, 2007, I authorized the temporary suspension of the adjudication time limits for cases where the Immigration Judge found, or the Department of Homeland Security is arguing, that the respondent is barred from asylum on the basis of having provided material support to a terrorist organization. The memorandum advised that the Board was awaiting guidance from the Department concerning the implementation of any policy that could affect Board decisions as a result of the announcement by the Departments of Justice, State and Homeland Security that they would expand the use of section 212(d)(3)(B)(i) of the Immigration and Nationality Act (discretionary exemption of the bar to aliens who have provided material support to a terrorist or terrorist organization). As noted in the Board's recent decision in *Matter of S-K-*, 24 I&N Dec. 475, 476 (BIA 2008), the Secretary of Homeland Security decided to exercise his discretionary authority under section 212(d)(3)(B)(i) of the Act to determine that the material support bar did not apply to certain aliens applying for immigration benefits. However, the publication of *Matter of S-K-*, does not address some important outstanding issues related to the material support bar and the implementation of the Secretary's exemption authority.

The Board has been participating in an interagency working group comprised of representatives from USCIS, ICE and EOIR regarding an implementation process for the adjudication of individual 212(d)(3)(B)(i) exemption cases for those aliens who have been placed in proceedings before EOIR. Until procedures are finalized, I am continuing to direct that the adjudication time limits be temporarily suspended in individual cases where the Immigration Judge found, or DHS is arguing, that the respondent is barred from relief on the basis of having provided material support to a terrorist or terrorist organization. If you come across a case with this or similar issues, please bring it to the attention of a Team Leader or Senior Panel Attorney.

Memorandum

BIA 08-02

Subject	Date
Case Hold Lifted - *Matter of C-Y-Z-* and *Matter of S-L-L-*	May 23, 2008

To	From
Board Legal Staff	Juan P. Osuna, Acting Chairman

As the result of the publication of *Matter of J-S-*, 24 I&N Dec. 520 (A.G. 2008), the existing hold (temporary suspension of the adjudication time limits) on cases which turn on the question of whether our holdings in *Matter of C-Y-Z-*, 21 I&N Dec. 915 (BIA 1997) (an alien whose spouse was forced to undergo an abortion or sterilization procedure can establish past persecution on account of political opinion and qualifies as a refugee within the definition of section 101(a)(42) of the Act), and *Matter of S-L-L-*, 24 I&N Dec. 1 (BIA 2006) (affirmed and clarified holding in *Matter of C-Y-Z-* as well as declined to extend *C-Y-Z-* to traditional or customary marriages), are controlling is lifted. Cases that were placed in the designated cabinets are in the process of being returned to the panels for adjudication.

Memorandum

BIA 08-03

Subject	Date
The Board's Standard/Scope of Review	May 23, 2008

To	From
Board Attorneys	Juan Osuna, Acting Chairman Ellen Liebowitz, Acting Senior Counsel

In 2002, the Attorney General issued a procedural reform regulation, which, in part, changed the standard and scope of review applied by the Board when reviewing a decision by an Immigration Judge. The standard/scope of review regulation is now found at 8 C.F.R. § 1003.1(d)(3).

This regulation mandates that the Board will not engage in *de novo* review of findings of fact determined by an Immigration Judge, but rather, shall review them only to determine whether the factual findings (including findings as to credibility) are clearly erroneous. *See* 8 C.F.R. § 1003.1(d)(3)(i).[1] The Board has *de novo* authority over questions of law, discretion, and judgment and all other issues in appeals from decisions of Immigration Judges. *See* 8 C.F.R. § 1003.1(d)(3)(ii). The regulation also limits the Board's ability to engage in fact-finding in the course of deciding appeals. *See* 8 C.F.R. § 1003.1(d)(3)(iv).[2]

The reform regulation was accompanied by a detailed Supplementary Information, which among other things, explained the interplay of the clearly erroneous standard of review and the Board's *de novo* review authority. *See* 67 Fed. Reg. 54,878 (Aug. 26, 2002); *see also Matter of A-S-B-*, 24 I&N Dec. 493 (BIA 2008).

EMPLOYMENT OF THE STANDARD/SCOPE OF REVIEW

When the Board reviews an Immigration Judge's decision, it is imperative to correctly identify and employ the standard of review being used by the Board. Depending on the particular needs of a case, it will often be appropriate to refer to the pertinent provisions of 8 C.F.R. § 1003.1(d)(3), along with the correct

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[1]The clearly erroneous standard of review does not apply to appeals filed before September 25, 2002. *See* 8 C.F.R. § 1003.3(f); *Matter of S-H-*, 23 I&N Dec. 462 (BIA 2002). The Board has *de novo* review authority over all issues arising in appeals filed before that date, with deference to the Immigration Judge in the area of credibility. *See e.g., Matter of A-S-*, 21 I&N Dec. 1106, 1109 (BIA 1998).

[2]Under 8 C.F.R § 1003.1(d)(3)(iii), the Board has *de novo* review authority over all questions arising in appeals from decisions issued by DHS officers.

terminology. The Board also has issued several precedent decisions, discussed below, addressing this regulation and the standard of review. These cases should be cited where appropriate. For example, where the Board is addressing an Immigration Judge's finding on whether a respondent met his or her burden of proof for protection under the Convention Against Torture (CAT), *Matter of V-K-*, 24 I&N Dec. 500 (BIA 2008), can be cited to explain why we will defer to the Immigration Judge's finding of facts insofar as they are not clearly erroneous, but we have *de novo* authority over the question of whether those facts support a conclusion that it is more likely than not that the respondent will be tortured upon return to his or her native country. Similarly, *Matter of A-S-B-*, 24 I&N Dec. 493 (BIA 2008) may be cited in instances where the Board is not finding any clear error on an Immigration Judge's *factfinding* in an asylum case, but is reaching a different conclusion on the *legal* issue of whether a respondent qualifies for asylum.

While each decision must be drafted in accordance with the particular circumstances of the case, it is of paramount importance that there are no ambiguities as to the standard of review being employed. For example, when referring to a legal, discretionary, or other determination made by an Immigration Judge over which the Board has *de novo* review authority, do not use language such as "there was no clear error by the Immigration Judge." Similarly, when reviewing factual findings by an Immigration Judge, be sure to refer to a lack of or existence of "clear" error. Do not use the term "substantial evidence" as this is not the standard the Board uses to review factual, legal, or discretionary issues, and use of that incorrect term can be very confusing to the parties and to a reviewing court.

RELEVANT PRECEDENT DECISIONS

The Board has issued a number of precedent decisions discussing the standard of review under the reform regulation. The two most recent precedents were issued this month. These decisions should be consulted and cited in decisions when discussing the standard of review. The precedent decisions are the following:

Matter of S-H-, 23 I&N Dec. 462 (BIA 2002). This case explains that under the new regulations, the Board has limited fact-finding ability on appeal, which heightens the need for Immigration Judges to include in their decisions clear and complete findings of fact that are supported by the record and are in compliance with controlling law. It adds that if the Immigration Judge does not conduct adequate factfinding, a remand may be necessary.

Matter of R-S-H-, 23 I&N Dec. 629 (BIA 2003). The Board discusses the highly deferential nature of the clearly erroneous standard of review. *See e.g, id.* at 637 ("[a] finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (*quoting from United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948)).

Matter of A-S-B-, 24 I&N Dec. 493 (BIA 2008). In this case, the court of appeals granted the government's unopposed motion to remand for the Board to explain its earlier statement that the issue of whether the alien met his burden of proof to show a "well-founded" fear of persecution was a question of law warranting a *de novo* review pursuant to 8 C.F.R. § 1003.1(d)(3)(ii). The Board, considering the guidance provided in the Supplementary Information to the procedural reform regulation, explained that the Board should defer

to the factual findings of an Immigration Judge, unless clearly erroneous, but retains independent judgment and discretion, subject to applicable governing standards, regarding pure questions of law and the application of a particular standard of law to those facts. The decision also explains that to determine whether established facts are sufficient to meet a legal standard, such as a "well-founded fear," the Board is entitled to weigh the evidence in a manner different from that accorded by the Immigration Judge, or to conclude that the foundation for the Immigration Judge's legal conclusions was insufficient or otherwise not supported by the evidence of record. This case also contains a discussion about the Board's authority to consider the total content of documentary evidence admitted into the record by an Immigration Judge. *See Matter of A-S-B-, supra*, at 498.

Matter of V-K-, 24 I&N Dec. 500 (BIA 2008). In this case, the court of appeals granted the government's unopposed motion to remand for clarification of whether the Board had authority to reverse the Immigration Judge's finding that the respondent established, by a preponderance of the evidence, that he would more likely than not be tortured upon return to his native country. Upon considering the regulations and the Supplementary Information, the Board found it had *de novo* review authority over an Immigration Judge's prediction or finding regarding the likelihood that an alien will be tortured upon return to his native country, because the question relates to whether the ultimate statutory requirement for establishing eligibility for relief from removal has been met. The Board also clarified that while it reviewed an Immigration Judge's factual rulings for clear error, a prediction of the probability of future torture, although it may be derived in part from "facts," is not the sort of determination limited by the clearly erroneous standard. We noted that the fact that the Immigration Judge's prediction derived from his acceptance of an expert witness's testimony does not affect its nature as a prediction relating to whether an ultimate legal standard has been met.

Memorandum

BIA 08-04

Subject	Date
Dada v. Mukasey - Case Hold and guidance	July 2, 2008

To	From
Board Legal Staff	Juan P. Osuna, Acting Chairman

This memorandum addresses the United States Supreme Court's decision in *Dada v. Mukasey*, 128 S.Ct. 2307 (2008). It discusses the facts and holding of the decision, provides general guidance on how the Board will approach cases effected by *Dada*, and details a hold effective immediately for a narrow group of cases. If you are in doubt about how to resolve a *Dada*-related matter, please discuss it with your Team Leader, Senior Panel Attorney, and/or Board Members.

I. Dada v. Mukasey - The Decision

The respondent had requested that an Immigration Judge continue his proceedings pending the adjudication of a visa petition filed by his United States citizen spouse. The request was denied, and the respondent was granted voluntary departure. The respondent then appealed the denial of his request for a continuance. The Board dismissed the appeal, and reinstated the grant of voluntary departure for a 30-day period. Two days prior to the end of the 30-day period, the respondent filed a motion to reopen before the Board asserting that he had new evidence to support the bona fides of his marriage, and requesting that the proceedings be continued until the visa petition was adjudicated by the Department of Homeland Security. He also requested permission to withdraw his request for voluntary departure. The Board denied reopening citing to section 240B(d) of the Immigration and Nationality Act, which bars an alien from adjustment of status and other relief for 10 years when he/she fails to voluntarily depart within the permitted period. The Board did not address the respondent's request to withdraw his voluntary departure request.

The respondent filed a petition for review, and the Court of Appeals for the Fifth Circuit affirmed the Board's decision. In doing so, it found that the Board's reading of the applicable statutes as rendering the respondent ineligible for relief was reasonable. The Fifth Circuit agreed with the First and Fourth Circuits in concluding that there is no automatic tolling of the voluntary departure

period, in contrast to four circuits which found that tolling applied.[1] Mr. Dada filed a writ of certiorari with the Supreme Court. The Supreme Court granted certiorari in order to resolve the conflict among the courts of appeal.

In a 5-4 decision, the majority of the Supreme Court held that:

> . . . to safeguard the right to pursue a motion to reopen for voluntary departure recipients, the alien must be permitted to withdraw, unilaterally, a voluntary departure request before expiration of the departure period, without regard to the underlying merits of the motion to reopen. As a result, the alien has the option either to abide by the terms, and receive the agreed-upon benefits, of voluntary departure; or, alternatively, to forgo those benefits and remain in the United States to pursue an administrative motion.

See Dada v. Mukasey at 2319. The Court reasoned that it was necessary to read the Act in a manner which preserved an alien's right to pursue reopening while respecting the government's interest in *the quid pro quo* of the voluntary departure agreement. In reaching its decision, the Supreme Court found that there was no statutory authority in the Act providing for automatic tolling of voluntary departure period during the pendency of a motion to reopen. *Id.* The Supreme Court rejected the government's argument that an alien waives his right to pursue a motion to reopen if he is granted voluntary departure.

II. Applying Dada to pending and future cases - HOLD

A. Addressing cases pending at the Board on or before *Dada* was decided. *Dada* dictates that when an alien (*1*) submits a request to withdraw his/her voluntary departure, and (*2*) the request precedes the expiration of the voluntary departure period, the Board must recognize and honor that request **regardless of the merits of the underlying motion**. However, most of the cases pending before us now are unlikely to contain an affirmative request to withdraw voluntary departure (if there is one, and it is filed within the voluntary departure period, it should be adjudicated as indicated below). A withdrawal request is especially unlikely in the four circuits which had adopted the automatic tolling principle now invalidated by *Dada*. *See infra* n.1.

The Board anticipates that the Attorney General will soon issue a public notice which will provide aliens who filed motions with the Board on or before June 16, 2008, and prior to the expiration of

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[1] *See Chedad v. Gonzales*, 497 F.3d 57 (1st Cir. 2007); *Dekoladenu v. Gonzales*, 459 F.3d 500 (4th Cir. 2006); *see also Banda-Ortiz v. Gonzales*, 445 F.3d 387 (5th Cir. 2006). The 3rd, 8th, 9th and 11th circuits found that the tolling doctrine did apply. *See Kanivets v. Gonzales*, 424 F.3d 330 (3rd Cir. 2005); *Sidikhouya v. Gonzales*, 407 F.3d 950 (8th Cir. 2005); *Azarte v. Ashcroft*, 394 F.3d 1278 (9th Cir. 2005); *Ugokwe v. United States Atty. Gen.*, 453 F.3d 1325 (11th Cir. 2006).

the voluntary departure period with the opportunity to submit a request to withdraw their voluntary departure.

Accordingly, effective immediately, cases meeting all of the below criteria will be placed on HOLD:

1. **The motion was filed on or before June 16, 2008;**

2. **prior to the expiration of the voluntary departure period;**

3. **with no request to withdraw voluntary departure; and**

4. **the bars at section 240B(d) would be the sole basis for denying the motion (Shaar bar).**

Please note that if the motion would be denied on grounds other than the Shaar bar, you should process the case as usual, explaining why the decision is not controlled by *Dada* or the Attorney General's notice.

If you come across a case meeting these criteria, please bring it to the attention of a Team Leader or Senior Panel Attorney so that the adjudication clock can be promptly stopped, and the record can be placed in designated cabinets. Any other motions should be circulated, distinguishing *Dada* where appropriate. **If a withdrawal request has been submitted, prepare an order for Board Member consideration under the guidelines given below.**

B. Addressing unilateral requests to withdraw voluntary departure. As noted above, *Dada* dictates that when an alien (*1*) submits a request to withdraw his/her voluntary departure, and (*2*) the request precedes the expiration of the voluntary departure period, the Board must recognize and honor that request **regardless of the merits of the underlying motion**. With this in mind, it is very important that:

(i) The record should be carefully reviewed to see if the respondent submitted any statements which reflect that he/she seeks to withdraw a request for voluntary departure. The request could be contained within the motion (or even a direct appeal), or a supplemental filing, and may just constitute a single sentence or phrase;

(ii) No matter how cursory the request, once a request to withdraw voluntary departure is made, the Board's decision **must** contain language acknowledging the respondent's request;

(iii) If the respondent's request was received by the Board prior to the expiration of the voluntary departure period, the request is effective (regardless of any DHS opposition). As a result, the Board **shall not** apply the bar to discretionary relief found at section 240B(d) of the Act (alien who remains

in the United States after the scheduled date of departure is statutorily ineligible for discretionary relief).

(iv) Where the Board determines that the motion is denied or the appeal is dismissed, ORDER or FURTHER ORDER language should be included which reflects that the respondent shall be removed as provided in the Immigration Judge's order. Below is an example of ORDER/FURTHER ORDER language which may apply:

> ORDER (or FURTHER ORDER): In light of the respondent's withdrawal of his voluntary departure request, the respondent shall be removed as provided in the Immigration Judge's order.

C. Supplemental filings or motions. The Board is also anticipating that we will receive supplemental filings or motions in pending cases, and motions following Board decisions denying the respondent's prior motion based upon the alien's failure to comply with the voluntary departure order, particularly in cases arising in circuits that allowed tolling before *Dada*. Such supplemental filings may seek to withdraw the alien's voluntary departure. Refer such cases to your supervisor for referral to the J Panel.

Memorandum

BIA 08-05

Subject	Date
Case Hold - Persecution claim based on female genital mutilation (FGM)	July 16, 2008

To	From
Board Legal Staff	Juan P. Osuna, Acting Chairman

Pursuant to 8 C.F.R. § 1003.1(e)(8)(iii), I am directing that cases which involve aliens who claim a fear of persecution based on female genital mutilation (FGM) be placed on hold. If you have or find a case involving this issue, please bring it to the attention of your Team Leader or Senior Panel Attorney so that the adjudication clock can be promptly stopped, and the record can be placed in designated cabinets.

Memorandum

BIA 08-06

Subject	Date
Administrative Closure of cases pursuant to the *ABC* Settlement Agreement	October 1, 2008

To	From
Board Legal staff	Juan P. Osuna, Chairman

The Board is anticipating receiving requests for administrative closure in a limited number of pending Salvadoran and Guatemalan cases as the result of a change in policy by the U.S. Citizenship and Immigration Services ("USCIS") relating to registration for benefits under the settlement agreement set forth in *American Baptist Churches v. Thornburgh*, 760 F.Supp. 796 (N.D.Cal. 1991) ("*ABC*"). On September 22, 2008, the USCIS issued the attached Fact Sheet regarding their "New Policy for *ABC* Registration Determinations After *Chaly-Garcia v. U.S.*, 508 F.3d 1201 (9th Cir. 2007).[1] The Fact Sheet advises Salvadoran and Guatemalan *ABC* class members with cases pending before EOIR who were previously found ineligible for *ABC* benefits and believe they are eligible for *ABC* benefits under the *Chaly-Garcia* ruling to file a motion to administratively close their proceedings. This memorandum provides general guidance on addressing such requests for administrative closure. If you have any questions regarding the processing of these requests for administrative closure, please consult your Team Leader or Senior Panel Attorney, and/or Board Member.

Application of the *ABC* settlement agreement - The Board has previously determined that EOIR's role under the *ABC* settlement agreement is restricted to inquiries under paragraph 19 of the agreement. *Matter of Morales*, 21 I&N Dec. 130 (BIA 1996). In this regard, (1) whether the alien is a class member, (2) whether he has been convicted of an aggravated felony, and (3) whether he is subject to detention under paragraph 17 of the agreement. *Id.*

Initially, the *ABC* settlement agreement defines an ABC class members as all Salvadorans in the United States as of September 19, 1990; and all Guatemalans in the United States as of October 1, 1990. Paragraph 19 of the *ABC* settlement agreement provides in relevant part:

> [A]ny class member whose deportation proceedings is based on a criminal ground of deportability or whose proceedings commenced after November 30, 1990, will not have his or her case automatically administratively closed on or before January 31, 1991. Rather, that individual may ask the Immigration Court or the BIA to administratively close his or her case and the case will be administratively closed unless the class member has been convicted of an aggravated felony or is subject to detention under paragraph 17.

[1] The Fact Sheet is also available online at www.uscis.gov/files/article/Chaly_22Sep08.pdf

Paragraph 17 of the agreement sets forth the conditions under which DHS (former INS) may detain eligible class members. It provides in relevant part:

> The INS may only detain class members, eligible for relief under paragraph 2, who are otherwise subject to detention under current law and who: (1) have been convicted of a crime involving moral turpitude for which the sentence actually imposed exceeded a term of imprisonment in excess of six months; or (2) pose a national security risk; or (3) pose a threat to public safety.

The Board has held that the former INS, now DHS/USCIS is assigned the role of making substantive determinations of an alien's eligibility and EOIR's obligation is to assure that each qualified class member under paragraph 19 has an opportunity for an eligibility determination by USCIS. *Matter of Morales, supra*, at 134. As a result, the Board will not evaluate whether or not a class member is eligible for a *de novo* asylum adjudication before an Asylum Officer as provided under paragraph 2 of the settlement agreement.

Accordingly, where a class member requests administrative closure from the Board and they are not convicted of an aggravated felony and are not subject to detention under the provisions of paragraph 17 of the settlement agreement, administrative closure should be granted in accordance with the *ABC* settlement agreement. However, if you have a case where the alien seeking administrative closure is detained or is subject to paragraph 17, please bring the matter to the attention to your Team Leader or Senior Panel Attorney for further assessment.

Suggested language - Below is some suggested language granting the request for administrative closure as well as ORDER language:

> In the present case, the respondent has requested administrative close proceedings based upon his/her membership in the class of persons governed by the settlement agreement in *American Baptist Churches v. Thornburgh*, 760 F.Supp. 796 (N.D.Cal. 1991) ("*ABC*"). The respondent appears to be a class member by the terms of the settlement, and he/she has not been convicted of an aggravated felony and is not subject to detention under paragraph 17 of the settlement agreement. We further find that this case is governed by our precedent decision in *Matter of Morales*, 21 I&N Dec. 130 (BIA 1995). Therefore, we find that administrative closure is appropriate under the facts of this case.
>
> ORDER: The respondent's motion for administrative closure is granted.
>
> FURTHER ORDER: The proceedings before the Board in this case are continued indefinitely without further Board action pending the respondent's effectuation of her/his rights under the *ABC* settlement.
>
> FURTHER ORDER: Proceedings will be reinstated upon written notice by either party with proof of service of such notice upon the opposing party.

Decision and Disposition Codes - When a case is administratively closed pursuant to the *ABC* settlement, please select the CON decision code and the N disposition code on the back of the circulation sheet.

Office of Communications

U.S. Citizenship and Immigration Services

Fact Sheet

Sept. 22, 2008

New Policy for *ABC* Registration Determinations After *Chaly-Garcia v. U.S.*, 508 F.3d 1201 (9th Cir. 2007)

On November 29, 2007, the United States Court of Appeals for the Ninth Circuit issued a ruling in *Chaly-Garcia v. U.S.*, 508 F.3d 1201 (9th Cir. 2007) regarding what may constitute evidence of registration for benefits under the ABC Settlement Agreement, as set forth in *American Baptist Churches (ABC) v. Thornburgh*, 760 F. Supp. 796 (N.D. Cal. 1991). The Ninth Circuit interpreted the *ABC* registration rules under the Settlement Agreement and found that, "Plaintiff's written asylum application, which demonstrated his membership in the *ABC* class, thus requested the benefits of the *ABC* Agreement and was a writing that indicated an intent to receive them."

Previously, in determining whether Guatemalan and Salvadoran nationals satisfied the registration requirement to receive *ABC* benefits under the Settlement Agreement, USCIS required evidence of registration, which could be established through credible testimony. Prior to the *Chaly-Garcia* decision, USCIS did not view the filing of an affirmative asylum application alone as sufficient evidence to satisfy the ABC Settlement Agreement registration requirement. Pursuant to the Ninth Circuit's findings, however, USCIS will consider that a Guatemalan or a Salvadoran national who affirmatively filed an I-589 application during the registration period indicated the intent to receive *ABC* benefits under the ABC Settlement Agreement and therefore will be considered "registered."

Questions & Answers

Q1: What were the original registration requirements under the Settlement Agreement?
A1: Under the Settlement Agreement, a Guatemalan or Salvadoran class member must have indicated to the legacy Immigration and Naturalization Service (INS) (the predecessor agency to USCIS) his or her intent, in writing, to: (1) apply for a *de novo* asylum adjudication before an Asylum Officer, or (2) receive *ABC* benefits. Additionally, a Salvadoran class member could have applied for Temporary Protected Status (TPS) under Section 303 of the Immigration Act of 1990.

Q2: Historically how has legacy INS and now USCIS determined compliance with registration requirements?
A2: To be eligible for *ABC* benefits, a Guatemalan or Salvadoran class member must have registered directly for *ABC* by sending an *ABC* registration form to the legacy INS by the date agreed upon by the parties to the ABC Settlement Agreement. A Salvadoran class member also may have registered by applying for TPS by the required date.

Guatemalans and Salvadorans had different registration dates, as follows:

- Guatemalans: Must have sent an *ABC* registration form to INS on or before December 31, 1991.

- Salvadorans: Must have sent an *ABC* registration form to INS or applied for TPS on or before October 31, 1991.

In determining whether Guatemalan and Salvadoran nationals satisfied the registration requirement to receive *ABC* benefits, USCIS required evidence of registration, which could include credible testimony.

Q3: How has *Chaly-Garcia* changed the registration requirements under the ABC Settlement Agreement?
A3: Generally, a Guatemalan or a Salvadoran class member evidenced registration through the submission of an *ABC* registration form or credible testimony that he or she submitted such a form to INS during the relevant time period. USCIS did not view the filing of an affirmative asylum application alone as evidence that satisfied the registration requirement. Pursuant to *Chaly-Garcia*, however, USCIS will now consider such a filing as evidence of an individual's intent to register for *ABC* benefits.

As such, USCIS will consider Guatemalan nationals who affirmatively filed an I-589 application between December 19, 1990 and December 31, 1991; and Salvadoran nationals who affirmatively filed an I-589 application between December 19, 1990 and October 31, 1991, as having met the *ABC* registration requirement.

Q4: Why has USCIS chosen these specific dates?
A4: On December 19, 1990, the court provisionally approved the ABC Settlement Agreement. Accordingly, Guatemalan and Salvadoran nationals could express their intent to receive *ABC* benefits as provided in the Settlement Agreement on or after December 19, 1990. December 31, 1991 is the last date that Guatemalan nationals were able to evidence their intent to receive *ABC* benefits. October 31, 1991 is the last date that Salvadoran nationals were able to evidence their intent to receive *ABC* benefits or apply for TPS.

Q5: What rights are accorded to individuals who registered for *ABC* benefits?
A5: Guatemalan and Salvadoran class members who are eligible for the benefits of the Settlement Agreement are entitled to the following:

- stay of deportation/removal;
- *de novo* asylum interview and decision by an Asylum Officer under the 1990 asylum regulations;
- restrictions on detention under immigration law; and
- employment authorization.

In addition, individuals eligible for *ABC* benefits may be eligible to have their applications for special rule cancellation of removal or suspension of deportation under Section 203 of the Nicaraguan and Central American Relief Act (NACARA) considered by a USCIS asylum officer (see question 11, below).

For additional details, see HYPERLINK for Webpage titled, *American Baptist Churches v. Thornburgh (ABC) Settlement Agreement*.

Q6: *Chaly-Garcia* involved a Guatemalan national. Do I have to be a national of Guatemala to be considered under this new policy for determining whether I met the registration requirement for *ABC* benefits?

A6: No. The Settlement Agreement involves nationals from Guatemala and El Salvador. Accordingly, the new policy for determining whether an individual timely registered for *ABC* benefits includes nationals from both Guatemala and from El Salvador.

Q7: Will all asylum applications filed with USCIS be considered under this new policy for determining whether the registration requirement for *ABC* benefits has been met?
A7: No. Only asylum applications filed by Guatemalan nationals between December 19, 1990 and December 31, 1991 will be considered as evidence of meeting the registration requirement. In the case of Salvadoran nationals, only asylum applications filed between December 19, 1990 and October 31, 1991 will be considered as evidence of meeting the registration requirement.

Q8: What if I did not file my asylum application with USCIS between these dates? May I still meet the registration requirement for *ABC* benefits?
A8: Yes. You still must produce some other evidence that you timely registered for *ABC* benefits.

Q9: If I filed my asylum application with USCIS between these dates, do I automatically receive *ABC* benefits?
A9: No. The registration requirement is only one of three requirements that you must meet to receive *ABC* benefits. You also must demonstrate that you are a class member and that you have applied for asylum by the required date:

- You are a Guatemalan national who initially entered the United States on or before October 1, 1990, and you filed an asylum application on or before January 3, 1995.
- You are a Salvadoran national who initially entered the United States on or before September 19, 1990, and you filed an asylum application on or before January 31, 1996 (grace period until February 16, 1996).

A class member who meets these requirements may still be ineligible for benefits if he or she has been convicted of an aggravated felony or was apprehended at the time of entry after December 19, 1990.

Q10: What if my case is pending before USCIS and I filed an asylum application between the relevant dates?
A10: You will be scheduled for an interview at the asylum office. You must go to your interview, at which time it will be determined whether you timely registered for *ABC* benefits under the Settlement Agreement. However, you still must demonstrate that you meet the other requirements to show that you are eligible for *ABC* benefits.

Q11: What is the relationship between eligibility for *ABC* benefits and eligibility for NACARA relief?
A11: An individual who is eligible for *ABC* benefits is entitled to receive a *de novo* asylum interview and decision by an Asylum Officer under the 1990 asylum regulations. In addition, certain *ABC* class members may file Form I-881, *Application for Suspension of Deportation or Special Rule Cancellation of Removal under section 203 of NACARA*, and if approved, receive legal permanent residence status.

Q12: What if my asylum application (filed between the relevant dates) is pending before USCIS, but my NACARA application was not granted solely because it was determined that I did not timely register for *ABC* benefits?
A12: You will be scheduled for an asylum interview at the asylum office. You must go to your interview, at which time the asylum office will reconsider the determination that you are not eligible for *ABC* benefits. If it is determined that you are eligible for *ABC* benefits and possibly NACARA relief, the

asylum office will reopen and reconsider your NACARA application. Otherwise, the asylum office will proceed with an *ABC* asylum interview.

Q13: What if I have a pending asylum application before USCIS that I filed between the relevant dates, but I never filed a NACARA application because I thought that I would not be able to demonstrate that I timely registered for *ABC* benefits?
A13: You should file Form I-881, *Application for Suspension of Deportation or Special Rule Cancellation of Removal (Pursuant to Section 203 of Public Law 105-100, NACARA)* as soon as possible. If you are scheduled for an asylum interview before you are scheduled for a NACARA interview, go to your asylum interview with a copy of your I-881 filing receipt, a copy of your I-881 and supporting documentation. The asylum office will conduct a NACARA interview instead of an asylum interview, or reschedule a NACARA interview to take place at a later date. At your NACARA interview, you still must demonstrate that you have met each eligibility requirement for NACARA relief as explained in *Part II, Eligibility to be Granted Relief* of the *Instructions*.

Q14: What if USCIS determined that I was ineligible for *ABC* benefits solely because I did not meet the registration requirement, but I filed an asylum application between the relevant dates and my case is pending before an immigration judge or the Board of Immigration Appeals of the Executive Office for Immigration Review (EOIR)?
A14: You should discuss your case with your representative, who may coordinate with your local U.S. Immigration and Customs Enforcement (ICE) Office of the Chief Counsel to evaluate your *ABC* eligibility under this new policy. If you believe that you are eligible for *ABC* benefits under this new policy, you should file a motion with EOIR to administratively close proceedings based on *ABC* eligibility pursuant to the *Chaly-Garcia* decision. Administrative closure of *ABC* class member cases is governed by paragraphs 17 and 19 of the ABC Settlement Agreement. If EOIR administratively closes proceedings, USCIS will then review your case. In general, USCIS will **NOT** reconsider the decision if your case was referred to the Immigration Court for any reason other than a failure to demonstrate timely registration for *ABC* benefits.

Q15: What if USCIS determined that I was ineligible for *ABC* benefits solely because I did not meet the registration requirement, but I filed an asylum application between the relevant dates and my case is pending before a federal court?
A15: You should discuss your case with your representative, who may coordinate with the Department of Justice's Office of Immigration Litigation and ICE to evaluate your *ABC* eligibility under this new policy. If you believe that you are eligible for *ABC* benefits under this new policy, you may file a motion to stay the proceedings with the federal court. USCIS will then review your case. In general, USCIS will **NOT** reconsider the decision if your case was referred to the Immigration Court for any reason other than a failure to demonstrate timely registration for *ABC* benefits.

Q16: What if USCIS determined that I was ineligible for *ABC* and/or NACARA benefits solely because I did not meet the registration requirement, but I filed an asylum application between the relevant dates and my case was <u>not</u> referred to the Immigration Court?
A16: You must submit a Motion to Reconsider with the asylum office that has jurisdiction over your case, indicating that you may be eligible for *ABC* benefits pursuant to the *Chaly-Garcia* decision, in order to have the USCIS decision reviewed. If USCIS grants the Motion to Reconsider after finding that you are eligible for *ABC* benefits based on this new policy, you will be scheduled for another NACARA or asylum interview, as appropriate. You must go to your interview, at which time it will be determined whether you have timely registered for *ABC* benefits under the Settlement Agreement. If applying for NACARA, you still must demonstrate that you have met each eligibility requirement for NACARA relief as explained in *Part II, Eligibility to be Granted Relief Instructions*.

Memorandum

BIA 08-07

Subject	Date
Case Hold Lifted - material support bar; DHS implementation of § 212(d)(3)(B)(i) exemption	November 25, 2008

To	From
Board Legal Staff	Juan P. Osuna, Chairman JPO

The Department of Homeland Security ("DHS") has announced the implementation of the Secretary's exercise of exemption authority pursuant to section 212(d)(3)(B)(i) of the Immigration and Nationality Act for certain terrorist-related inadmissibility grounds for cases with administratively final orders of removal. *See* attached October 23, 2008, Fact Sheet "Department of Homeland Security Implements Exemption Authority For Certain Terrorist-Related Inadmissibility Grounds For Cases With Administratively Final Orders Of Removal." As a result of this announcement, the adjudication hold that I directed in January 2007 (BIA 07-01) and March 2008 (BIA 08-01) is now lifted. Cases that were placed in designated cabinets will be returned to the panels for adjudication.

In addition, the following memorandum provides general information regarding the effect of the DHS implementation of the section 212(d)(3)(B)(i) exemption on cases pending before the Board as well as for those cases with administratively final orders of removal. If you have questions related to the terrorist-related inadmissibility grounds at section 212(a)(3)(B) of the Act or the DHS exemption, please consult your Team Leader or Senior Panel Attorney, and/or Board Member.

Background

In general, certain terrorist-related activities by an alien may result in that individual being barred from admission or remaining in the United States. The grounds of inadmissibility for terrorist-related activities may be found at section 212(a)(3)(B) of the Act. The Attorney General is prohibited from granting some forms of relief from removal to aliens who are inadmissible or removable for terrorist-related activities described in section 212(a)(3)(B) of the Act. For example, an individual may be barred from asylum, withholding of removal, or adjustment of status if he or she is found to be inadmissible for having engaged in terrorist activity by providing material support to a designated terrorist organization. However, pursuant to section 212(d)(3)(B)(i) of the Act, the Secretary of Homeland Security may conclude in his sole unreviewable discretion to exempt the effect of an individual's terrorist-related activities.[1] As a result, if the Secretary of Homeland Security favorably exercises his authority and grants a section 212(d)(3)(B)(i) exemption in a particular case, the terrorist-related ground of inadmissibility or removability or bars to relief are no longer applicable in removal proceedings.

[1] The Secretary of State may not exercise section 212(d)(3)(B)(i) exemption authority with respect to an individual once he or she is placed in removal proceedings.

Delegation of Authority to USCIS - The Secretary of Homeland Security has exercised his discretionary authority not to apply some of the terrorist-related inadmissibility grounds in section 212(a)(3)(B) of the Act for particular categories of cases. Those aliens that fall within an authorized category may be considered for the section 212(d)(3)(B)(i) exemption on a case-by-case basis. The Secretary has tasked USCIS, in consultation with ICE, with the authority to grant exemptions. Moreover, in order for USCIS to consider granting an exemption, it is required that the alien:

- is seeking a benefit or protection under the Act and has been determined to be otherwise eligible for the benefit or protection;
- has undergone and passed relevant background and security checks;
- has fully disclosed, in all relevant applications and interviews with U.S. Government representatives and agents, the nature and circumstances of each activity or association falling within the scope of section 212(a)(3)(B) of the Act;
- poses no danger to the safety and security of the United States; and
- merits a favorable exercise of authority as a matter of discretion in the totality of circumstances.

For information regarding the authorized categories of cases as well as designated terrorist organizations that have been included for consideration of a section 212(d)(3)(B)(i) exemption, you should refer to the USCIS website at www.uscis.gov. In addition to the attached Fact Sheet, USCIS has also posted on its website several memoranda related to its implementation processes for the section 212(d)(B)(3)(i) exemption. Federal Register Notices announcing the Secretary's exercise of authority are also available at EOIR's Virtual Law Library under the Federal Register Link at http://eoirweb/library/fedreg/fedreg_index.htm. Furthermore, you may wish to consult Linda Alberty's article, *Material Support to a Terrorist Organization – A Look at the Discretionary Exemption to Inadmissibility for Aliens Caught Between a Rock and a Hard Place*, Immigration Law Advisor, Vol. 2 No. 4 (April 2008).

EOIR proceedings - section 212(d)(3)(B)(i) Exemption

Cases with an administratively final order of removal - For individuals placed in removal proceedings, only the Secretary of Homeland Security may determine whether or not to apply the section 212(d)(3)(B)(i) exemption. The DHS has announced that USCIS, in consultation with ICE, will consider a case for an exemption only after an order of removal is an administratively final order. The ICE office handling the EOIR case will forward to USCIS only those cases where relief or protection was denied solely on the basis of one of the terrorist-related inadmissibility grounds for which exemption authority has been exercised by the Secretary. ICE is responsible for notifying an alien if the alien's case will be referred to USCIS for consideration of the exemption.[2]

In those cases where USCIS grants an exemption, ICE is responsible for initiating a process for the filing of a motion to reopen proceedings before EOIR. It is anticipated that the joint motions will titled "Joint Motion To Reopen To Grant [X Relief/Benefit] Based On USCIS Approval Of An INA § 212(d)(3)(B)(i) Exemption" or "Joint Motion To Reopen With Stipulation Of Facts To Grant [X relief/benefit] Based on USCIS Approval Of An INA § 212(d)(3)(B)(i) Exemption." In cases where the alien is not represented, it

[2] The USCIS determination regarding the section 212(d)(3)(B)(i) exemption is final. EOIR does not have the authority to review the USCIS 212(d)(3)(B)(i) exemption determination.

is anticipated that the DHS motion will be titled "DHS Motion To Reopen With A Summary Of The Respondent's Claim To Grant [X Relief/Benefit] Based On USCIS Approval Of An INA § 212(d)(3)(B)(i) Exemption." The Board's Jurisdiction and Motions Panel will be adjudicating any *Joint Motion to Reopen* or *DHS Motion to Reopen* based upon the USCIS approval of the section 212(d)(a)(3)(B)(i) of the Act. If you are not a member of the motions team and you are assigned a case that involves a *Joint Motion to Reopen* or *DHS Motion to Reopen* based upon the USCIS approval of the section 212(d)(a)(3)(B)(i) exemption, you **must** consult your Team Leader and/or Senior Panel Attorney.

Pending cases before EOIR - As previously noted, a threshold requirement for USCIS consideration of the exemption is that an alien is otherwise eligible for the underlying relief being sought. Consequently, although neither the Board nor the Immigration Judges have the authority to grant the discretionary section 212(d)(3)(B)(i) exemption, resolution of issues related to the underlying relief by EOIR will assist DHS in the adjudication of the exemption. Therefore, it is anticipated that during the proceedings before the Immigration Judge, the parties, including ICE attorneys, will attempt to develop the record of proceedings to address various aspects of the threshold requirements announced by the Secretary of Homeland Security.

In addition, it is anticipated that Immigration Judges as well as the Board will be asked to not simply "pretermit" relief based on a finding that an alien's activities or associations fall within the scope of section 212(a)(3)(B) of the Act, but to also consider and address arguments related to eligibility for the underlying relief. For example, in *Matter of S-K-*, 23 I&N Dec. 936, 937 (BIA 2006), the Immigration Judge specifically addressed the respondent's underlying eligibility for asylum and withholding by finding that the respondent had established a well-founded fear of persecution in order to qualify for asylum, but also denied the application due to his determination that terrorist-related bars applied. In other words, the parties may request an explicit "but for" determination ("but for" the terrorist-related bar, relief from removal would be granted) by the Immigration Judge or the Board. If the Immigration Judge does pretermit the application for relief despite the parties request to develop the record, a remand may be required. Furthermore, in some cases where the Immigration Judge did not consider whether the respondent was otherwise eligible for the underlying relief, the Board may elect to remand the record to the Immigration Judge to address, in the first instance, the respondent's eligibility for such relief despite the applicability of the terrorist-related bars to relief.

If you have a case involving these issues, and are unsure how to proceed, please consult closely with your attorney managers and Board Members. Additionally, if you have questions, Senior Legal Advisor Amy Minton is a point of contact on these issues and may be reached at 703-605-0317.

Attachment

U.S. Citizenship and Immigration Services

Fact Sheet

Oct. 23, 2008

Department of Homeland Security Implements Exemption Authority for Certain Terrorist-Related Inadmissibility Grounds for Cases with Administratively Final Orders of Removal

Under section 212(d)(3)(B)(i) of the Immigration and Nationality Act (INA), the Secretary of Homeland Security may conclude in his sole unreviewable discretion to not apply certain of the terrorist-related grounds of inadmissibility at section 212(a)(3)(B) of the INA. As of Sept. 8, 2008, the Department of Homeland Security (DHS) began implementation of the Secretary's exercise of his exemption authority for certain terrorist-related inadmissibility grounds under section 212(d)(3)(B)(i) of the INA for cases issued administratively final orders of removal by the Department of Justice (DOJ), Executive Office for Immigration Review (EOIR).

The implementation currently covers detained cases with an administratively final order of removal and non-detained cases with an administratively final order of removal that was issued on or after Sept. 8, 2008.

DHS will consider a case for an exemption only after an order of removal is administratively final. An order of removal is generally considered an administratively final order when either a decision by the Board of Immigration Appeals (BIA) affirms an order of removal or the period in which the individual is permitted to seek review of such order by the BIA has expired, whichever date is earlier. By adjudicating the exemption at this stage, all parties will have a chance to litigate the merits of the case up through the BIA, and DHS will be able to focus its resources on cases where the possible exemption is the only issue remaining in the individual's case. The 212(d)(3)(B)(i) exemption will be considered even if the individual files a Petition For Review with a Federal Circuit Court of Appeals.

For individuals who are **not** in U.S. Immigration and Customs Enforcement (ICE) custody (non-detained) and for whom their administratively final order of removal was issued on or after Sept. 8, 2008, the ICE Office of the Chief Counsel handling the case will forward the case to U.S. Citizenship and Immigration Services (USCIS) for exemption consideration if relief or protection was denied **solely** on the basis of one of the grounds of inadmissibility for which exemption authority has been exercised by the Secretary. These individuals and their last attorneys of record will receive in the mail a *Notice of Referral* indicating that their case has been referred to USCIS for consideration of an available exemption to the terrorist-related inadmissibility provisions of the INA. An individual who receives such a notice does not need to take additional steps or contact ICE to initiate the process. However, it is imperative that the individual keep his/her address up to date with USCIS by filing the Form AR-11, *Change of Address*. Also, individuals are reminded that they must continue to comply with ongoing security check requirements. Thus, they may receive notices to update their fingerprints and biometrics during this process at their address on record with USCIS.

If an eligible individual is in ICE custody (detained) upon the issuance of an administratively final order of removal, the ICE Office of the Chief Counsel handling the case will serve the *Notice of Referral* on the individual in coordination with the ICE Office of Detention and Removal Operations (DRO). The individual will also be provided with a Form I-246, *Application for Stay of Deportation or Removal*. The *Notice of Referral* will explain to detained individuals that they must file the attached Form I-246 if they wish to have USCIS consider their eligibility for the 212(d)(3)(B)(i) exemption. In order to be considered for an exemption, the individual who is otherwise eligible for consideration must file the stay of removal request with DRO within seven (7) days of service of the letter. If that individual requests a stay of removal, his or her case will be forwarded to USCIS for consideration of the exemption authority.

USCIS will give priority to certain cases, including those where individuals are detained. The USCIS determination on the exemption is final and within the sole discretion of the Secretary of Homeland Security. Individuals cannot appeal the decision to EOIR. USCIS will directly notify the individual and the appropriate ICE Office of the Chief Counsel of its determination. If USCIS finds that the case merits an exemption, the ICE Office of the Chief Counsel will then forward to the individual a request to join in a *Joint Motion to Reopen* before EOIR. This request will include a template of the *Joint Motion to Reopen*. The individual or, if represented, his/her counsel should sign the motion and return it to the ICE Office of the Chief Counsel. The appropriate Form EOIR-33 (IC or BIA) (Change of Address) with the individual's address information should be forwarded with the motion. If the individual is represented, a Form EOIR-28 (Entry of Appearance – Immigration Court) or Form EOIR-27 (Entry of Appearance – BIA) should be forwarded as well. Upon receipt, ICE will file the *Joint Motion to Reopen* with EOIR, attaching USCIS' grant of the exemption. For *pro se* individuals, if ICE has not received anything from the individual after two weeks, ICE will file an independent Motion to Reopen with a Summary of the Alien's Claim.

Information regarding the implementation of the exemption authority for cases of individuals who are not detained and received an administratively final order of removal before Sept. 8, 2008, will be forthcoming.

Memorandum

BIA 09-01

Subject	Date
Case Holds Lifted - *Dada v. Mukasey*	January 9, 2009

To	From
Board Legal Staff	Juan P. Osuna, Chairman

The adjudication hold announced in July 2008, (*Dada v. Mukasey* - Case hold and guidance; BIA 08-04), is now lifted. You should resume normal case adjudication on this issue. If you have a case involving issues affected by *Dada v. Mukasey*, and are unsure how to proceed, please consult with your attorney managers and Board Members. Additionally, if you have questions, you may wish to contact Board Member David Holmes and Senior Legal Advisor Molly Kendall Clark.

Further, you should consult the regulations that were issued post-Dada, *see* Voluntary Departure: Effect of a Motion to Reopen or Reconsider or a Petition for Review, 73 Fed. Reg. 76927 (December 18, 2008), and are effective on January 20, 2009. Additional guidance regarding this regulation will be forthcoming.

U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals

Chairman

5107 Leesburg Pike, Suite 2400
Falls Church, Virginia 22041

BIA 09-02

January 15, 2009

MEMORANDUM TO: Board Members
Board Legal Staff

FROM: Juan P. Osuna JPO
Chairman

SUBJECT: Circulation Sheets and Instructions

The purpose of this memorandum is to explain and provide general information regarding the proper completion of circulation sheets.

A circulation sheet serves many purposes. It allows Board Members, attorneys and paralegals to communicate case-related information. It also enables the docket team in the Clerk's Office to record important data regarding the disposition of each case. Additionally, the circulation sheets are used to track issues such as Immigration Judge conduct and cases that warrant investigation for attorney discipline by EOIR's Office of General Counsel.

It is very important that attorneys and paralegals accurately designate the appropriate decision and disposition codes. Certain recorded data is used by the Immigration Courts to schedule hearings for the respondent or to proceed with existing scheduled hearings. The selection of the wrong decision or disposition code can lead to the loss of valuable time and resources for personnel at the Immigration Court and the Board in correcting codes. Moreover, recorded data is shared with various components of the Department of Homeland Security, who in turn use our decision and disposition code data to make determinations regarding the benefits that aliens may be entitled to receive, as well as to take action to remove aliens from the United States. Therefore, accurately completing the circulation sheets is very important.

If you have any questions about completing a circulation sheet, please contact your Team Leader and/or Senior Panel Attorney, or Senior Legal Advisor Amy Minton.

I. FRONT SIDE

Although each Panel has its own circulation sheet, all Panel circulation sheets must meet specified basic requirements. With respect to individual Panel requirements, please consult any appropriate internal Panel directives.

Instructions for Board Members:

A. Initials & Date Box - After reviewing the draft decision, Board Members should place their initials next to their names, followed by the date. This informs the Board Member secretaries that the decision has been reviewed and may either be moved to another Board Member or sent to the Clerk's Office for processing.

B. Vote - Board Members should indicate "Yes" or "Ok"if they accept the decision, or "No" if they do not agree with the decision as drafted. The Clerk's Office will not process the case/motion unless the vote of the Board Member has been recorded.

C. SOP - Board Members should indicate whether they anticipate writing a separate opinion.

D. Decision Bank - If the Board Member believes that the decision should be included in the Decision Bank, the Board Member should place a check in the Decision Bank box.

E. Special Instructions To Docket - This section should be used to bring any special processing instructions to the attention of the Clerk's Office Docket Team. For example, this section may be used to request that a courtesy copy of the decision be sent to an attorney. This space should not be used to communicate with other Board Members or attorneys. However, if positive feedback is provided to the attorney or paralegal in the Comments/Analysis section, the Board Member should mark the "Copy of Circulation Sheet to Atty/PL, TL & SPA" box in this section.

F. Comments/Analysis - After reviewing the decision, Board Members may make comments regarding the drafted decision and write comments to other Board Members for their consideration. Board Members may prefer or elect to use a "Goldenrod" to communicate with other Board Members regarding a specific case.

This area may be utilized to provide positive feedback to the attorney or paralegal. Please note that, if positive feedback is provided to the attorney or paralegal, the Board Member should mark the "Copy of Circulation Sheet to Atty/PL, TL & SPA" box in the Special Instructions To Docket section.

G. IJC - If language in the proposed order addresses the Immigration Judge's conduct in the proceedings below, this notation should be circled. Moreover, if the Board's decision remands the case to a different Immigration Judge due to an Immigration Judge's conduct, this notation must be circled.

H. AC - This notation relates to egregious conduct of the private attorney in the case and should be circled when the record reveals that the attorney's conduct in representing the alien is of a nature serious enough that it may warrant an investigation by EOIR's Office of General Counsel (OGC). Circumstances which might warrant referral to OGC may be found at 8 C.F.R. § 1003.102.

In addition, this notation should be circled if there is any suspicions or concerns about possible fraud upon EOIR. The case may then be referred to OGC's Fraud Program for further consideration.

Instructions for Attorneys and Paralegals:

In addition to the general guidance below, you should consult your Panel's guidance for additional information on specific panel requirements for the completion of the front side of the circulation sheet.

A. 3 Bd. M or 1 Bd. M Box - Check the appropriate box to designate whether the circulated decision is either a three-Board Member decision or a single-Board Member decision.

B. Recirculate Box - This box should be checked if the proposed decision is being recirculated to the Board Member or Panel after revisions. When recirculating a case, a new circulation sheet must be used. The previous circulation sheet, comments, and prior proposed decision should all be attached to the new circulation sheet (folded). Furthermore, prior drafts of the Board's decision should have the front page crossed out in order to avoid confusion as to which draft is the final decision to be mailed out to the parties by the Clerk's Office.

C. A# and Name - The Alien(s) name(s) and alien registration number(s) should be filled in on the circulation sheet. If there is more than one alien and the decisions are not the same for all the aliens involved in the proceedings, separate circulation sheets must be filled out in order to reflect the different decision and disposition codes.

D. Attorney/Paralegal - The attorney or paralegal who prepared the decision should place his or her initials next to the Attorney/Paralegal box, followed by the date. This advises the Board Members, as well as the supervisory legal assistant or legal assistant, that the order is ready for review by the Panel.

E. Decision Bank - If the attorney or paralegal believes that the drafted decision should be included in the decision bank, place a check in the appropriate box. Moreover, please briefly explain why the drafted decision is appropriate for selection.

F. Special Instructions To Docket - This section should be used to bring any special processing instructions to the attention of the Clerk's Office docket team. For example, make a notation here to request that a courtesy copy of the decision be sent to an attorney or to indicate that the decision is an interim order. Note: Panel 3 has a designated Interim Order Circulation sheet which should be utilized by Panel 3 attorneys and paralegals.

G. IJC - If language in the proposed order addresses the Immigration Judge's conduct in the proceedings below, this notation should be circled. Moreover, if the Board's decision remands the case to a different Immigration Judge due to an Immigration Judge's conduct, this notation must be circled.

H. AC - This notation relates to egregious conduct of the private attorney in the case and should be circled when the record reveals that the attorney's conduct in representing the alien is of a nature serious enough that it may warrant an investigation by EOIR's Office of General Counsel (OGC). Circumstances which might warrant referral to OGC may be found at 8 C.F.R. § 1003.102.

In addition, this notation should be circled if there is any suspicions or concerns about possible fraud upon EOIR. The case may then be referred to OGC's Fraud Program for further consideration.

I. Comments/Analysis - This section should be used to bring substantive issues related to the draft decision to the attention of the Board Members. Comments should be clear, concise, and legible. If more room is necessary, prepare a separate memo, with the alien's name and alien registration number, and attach the memo to the circulation sheet. Note: Be sure to comply with any Panel-specific instructions when completing this section.

Immigration Judge - Identify the Immigration Judge whose decision is being challenged on appeal.

Circuit - Identify the controlling circuit law. Note: Usually the circuit of the final designated hearing location (where the final hearing takes place as identified in the final hearing notice issued by the Immigration Court) is controlling. A map identifying the 13 judicial circuits may be found on the EOIR Intranet; Virtual Law Library at:

http://eoirweb/library/geninfo/internalwork/weekly/circuit_main.htm

Document Filename - Identify the name and location of the electronic copy of the proposed decision. Note: Not all Panels require this information on their panel circulation sheet.

II. Reverse Side

The backside of the circulation sheet is used to record two types of codes: decision and disposition codes. Attorneys and paralegals must only select one decision code and one disposition code for each case.[1] Use a separate circulation sheet for each alien whenever a proposed order results in different decision or disposition codes for the aliens addressed in the order. This is important because it reduces the possibility of recording the wrong code.

Below is a description of the active decision and disposition codes currently used by the Board.

A. Decision Codes - The circulation sheet is used by the Clerk's Office docket team to process and close out a case once the decision has been approved and signed by the Board Member(s). The decision code is used not only to indicate the result of the case, but also to provide data to the Immigration Court, DHS, social service agencies, and Congress. Therefore, attorneys and paralegals must circle the appropriate decision code on the back of the circulation sheet.

Only **one** decision code may be selected. Therefore, it is important to select the single code that most correctly reflects the specific decision in each case.

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[1] When issuing an interim order, a decision and disposition code is not required. Except for Panel 3, "Interim Order" should be written in the **Special Instructions to Docket** section of the front side of the circulation sheet in order to alert the Clerk's Office that a decision and disposition code is not required.

Group I - This group generally applies to case appeals, bond appeals, DD appeals, and appeals of denials of Immigration Judge motions.

SUS This code applies when the appeal is sustained, that is, the appealing party prevails.

DIS This code applies when the appeal is dismissed, that is, the appealing party does not prevail, and the decision of the Immigration Judge or District Director stands.

DVD This code applies when the decision dismisses the appeal, but contains a FURTHER ORDER granting voluntary departure. This codes also applies if the Board reinstates voluntary departure.

SAF This code applies when the Board affirms without opinion the decision of the Immigration Judge or DHS officer as provided at 8 C.F.R. § 1003.1(e)(4).

SAV This code applies when the Board affirms without opinion the decision of the Immigration Judge as provided at 8 C.F.R. § 1003.1(e)(4), but further grants voluntary departure.

SUD This code applies when an appeal is summarily dismissed for any of the reasons stated at 8 C.F.R. §§ 1003.1(d)(2)(i)(A)-(H).

Group II - This group generally applies to motions to reopen or reconsider after a final administrative Board order.

DEN This code applies when the motion is denied. This code also applies when a motion is number or timed barred.

GNR This code applies when a motion is granted and the Board disposes of the case **without remanding** the matter to the Immigration Judge or District Director.

Group III - This group is a mixed bag and may apply either to appeals or motions.

BCR This code **MUST** be selected if the sole basis for the remand to the Immigration Court is for background and security checks to be completed or updated by the DHS. For example, the proposed decision provides that the alien is eligible for cancellation of removal, but the record does not reveal that security checks have been reported to the Immigration Judge by DHS or the record does not reveal that the prior reported checks are current.

NOTE: It is very important to select this code when the case is being remanded for the purpose of allowing DHS the opportunity to complete or update background and security checks. If not selected, the Immigration Court will not be able to properly process the case.

REM This code must be selected if ANY part of the decision, other than for background or security checks, remands the case to the Immigration Court or District Director.

NOTE: It is very important to select this code when the case is being remanded for any purpose other than for background and security checks. If not selected, the Immigration Court will not be able to properly process the case.

NJU This code applies where the Board lacks jurisdiction to review the merits of the appeal or motion. For example, this code is used when an alien files a direct appeal of an *in absentia* order, or an appeal is untimely.

CPG The CPC code was used to designated conditional asylum grants based upon coercive population control policies and has been replaced in CASE by the CPG code. Although the cap placed on CPC grants has been abolished, the requirement to record asylum grants based on coercive population control policies remains. However, unless the Board issues grants of relief as opposed to remanding pursuant to the security check rule, the **BCR** code should be selected when the respondent is found eligible for asylum based on coercive population control policies.

Note: The CPG code also applies when the decision is dismissing a DHS appeal of an Immigration Judge's grant of asylum on a conditional basis or the decision summarily affirms the appeal, or the appeal is withdrawn.

WDL This code applies when an appeal or motion is withdrawn.

TER This code applies when the Board's decision results in the proceedings being terminated because deportability or alienage has not been established. In this regard, the alien is not subject to exclusion/deportation/removal proceedings. Some other examples include when an alien is deceased; DHS adjusts the alien's status to that of a lawful permanent resident; or the alien is granted US citizenship by DHS. However, this code should **not** be selected when an application for relief, for example, asylum, is granted.

MBD This code applies (1) when a bond appeal is dismissed as moot per *Matter of Valles*, 21 I&N Dec. 769 (BIA 1997) (while an appeal is pending from an IJ's bond redetermination decision the IJ renders a second bond redetermination); (2) when the primary issue in the alien's deportation or removal proceeding is decided by the Board or IJ (administratively final decision); or (3) where the alien departed the United States (no longer considered in DHS custody).

OTH This code applies only when none of the other codes accurately reflect the outcome of the case.

Group IV - Miscellaneous group - These codes should generally not be selected unless there are specific instructions to do so.

CON This code applies when proceedings are being continued indefinitely. Currently, this code is being used to identify cases that are administratively closed because of repapering eligibility.

DED This code applies to cases that are administratively closed because the alien is subject to deferred enforced departure through Presidential Order.

TPS This code applies to cases administratively closed because the Attorney General or Department of Homeland Security has granted Temporary Protected Status to aliens of this nationality.

ABC This code applies to cases administratively closed pursuant to the settlement agreement in *American Baptist Churches v. Thornburgh*, 760 F.Supp. 796 (N.D.Cal. 1991) ("*ABC*"). Note: This code is in the process of being activated and will be placed on the circulation sheet in the near future. Until then, if you have a case in which this code is appropriate, please consult with your Team Leader or Senior Panel Attorney.

B. Disposition Codes

The disposition codes are used to determine whether the alien is under an administratively final order of exclusion/deportation/removal. Unlike the decision codes, which provide information about the nature of the decision, the disposition codes provide information to other government agencies regarding whether the alien is subject to removal. Therefore, in addition to designating a single decision code, attorneys and paralegals must also circle one of the following disposition codes.

Y This should be selected if the proposed order would subject the alien to an administratively final order of exclusion/deportation/removal with no voluntary departure or would leave such a preexisting order in effect. For example, this category would include initial orders of exclusion/deportation/removal where no relief of voluntary departure is granted and all subsequent orders denying an alien's motion to reopen or reconsider. Additionally, this code should also be selected for asylum or withholding only proceedings. This code is also selected when the only form of relief granted is withholding of removal or withholding or deferral under CAT, as DHS may remove the alien to a third country.

N This should be selected in all exclusion/deportation/removal cases where the alien is not or is no longer excludable/deportable/removable. This would include cases where relief is granted or the proceeding are terminated, proceedings are reopened or reconsidered, or no order of removal is entered. Additionally, this code is used for case appeals that are administratively closed, such as a continuation of a case indefinitely (CON), Deferred Enforced Departure (DED), Temporary Protected Status (TPS) orders, *ABC* Settlement cases (ABC).

REMINDER - Background Check Rule: Where the Board determines that relief should be granted or affirmed, but the record of proceedings does not reveal that checks have been completed, or that checks are current, the Board **must** remand the record to the Immigration Judge - BCR remand.

Z This code should be selected for proceedings where there is no decision on deportability or relief from removal such as when the case is remanded (BCR or REM decision codes). Also applies to visa petitions, fine proceedings, bond proceedings, rescission cases, interlocutory appeals, and recognition and accreditation cases, since these proceedings would not result in an order of exclusion/deportation/removal for the alien.

V This disposition code should be selected for cases where the Board's order grants or reinstates voluntary departure.

If you have any questions about which decision or disposition code should be used in a particular case, please contact your Team Leader and/or Senior Panel Attorney, or Senior Legal Advisor Amy Minton.

Memorandum

BIA 09-03

Subject	Date
CASE HOLD - Asylum claims filed by unaccompanied alien children	March 20, 2009

To	From
Board Legal Staff	Juan Osuna, Chairman

The William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044 (TVPRA) was enacted on December 23, 2008. The TVPRA provides, in relevant part, that an asylum officer shall have initial jurisdiction over any asylum application filed by an unaccompanied alien child (UAC). TVPRA § 235(d)(7)(B). This provision is effective on March 23, 2009, and applies to all aliens in pending proceedings before the Executive Office for Immigration Review on the date of enactment of the TVPRA.

Accordingly, pursuant to 8 C.F.R. § 1003.1(e)(8)(iii), I am directing that the adjudication time limits be temporarily suspended in individual **case appeals** where the following criteria are met:

❑ The alien filed an asylum application before the Immigration Court in his/her name, **and at the time of filing before the Immigration Court** was, or could have been, a UAC. A UAC is defined as a person:

- who has no lawful immigration status in the United States;
- who has not attained 18 years of age; and
- with respect to whom there is no parent or legal guardian in the United States, or for whom no parent or legal guardian in the United States is available to provide care and physical custody.

❑ The alien had *not* filed an affirmative asylum application before Citizenship and Immigration Services (or the former Immigration and Naturalization Service).

The record may not be clear about whether the child was unaccompanied at the time of filing, and whether an affirmative asylum application was filed. If the record is not clear, but the alien was under 18 at the time of filing, the case is subject to the hold. If you can tell that any one of these criteria do not apply, e.g., the alien was over 18 at the time the application was filed, the case is not subject to the hold. If you find a case falling within these guidelines, bring the case to the attention of your team leader or Senior Panel Attorney.

Memorandum

BIA 09-04

Subject	Date
CASE HOLDS LIFTED - Asylum claims filed by unaccompanied alien children	May 14, 2009

To	From
Board Legal Staff	Juan Osuna, Chairman

The case adjudication hold announced in March 2009 regarding asylum claims filed by unaccompanied alien children (UAC) is lifted. This hold was imposed in response to section 235(d)(7)(B) of the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044 (TVPRA), which provides that the Department of Homeland Security (DHS) asylum office has initial jurisdiction over any asylum application filed by a UAC. TVPRA § 235(d)(7)(B).

In the past month, the Board has reviewed any case in which the Immigration Court entered a code indicating that the alien was a juvenile. In those cases where the respondent could have been a UAC at the time of filing the asylum application, the Board remanded the case for further factfinding on whether the child is a UAC, and if so, to permit the respondent to file an application with DHS..

While those cases have been reviewed, there may be cases that were not caught by the Immigration Court. Please continue to review cases with these criteria in mind. If you find a case where the child could have been a UAC at the time the asylum application was filed, and the child has not pursued the asylum claim before DHS, please discuss the case with your team leader to determine whether remand is appropriate.

The criteria is as follows:

❑ The alien filed an asylum application before the Immigration Court in his/her name, **and at the time of filing before the Immigration Court** was, or could have been, a UAC. A UAC is defined as a person:

- who has no lawful immigration status in the United States;
- who has not attained 18 years of age; and

- with respect to whom there is no parent or legal guardian in the United States, or for whom no parent or legal guardian in the United States is available to provide care and physical custody.

❑ The alien had *not* filed an affirmative asylum application before Citizenship and Immigration Services (or the former Immigration and Naturalization Service).

Memorandum

BIA 09-05

Subject	Date
CASE HOLD - Texas Unauthorized Use of a Vehicle	May 20, 2009

To	From
Board Legal Staff	Juan Osuna, Chairman

Pursuant to 8 C.F.R. § 1003.1(e)(8)(iii), I am directing that the adjudication time limits be temporarily suspended in individual cases presenting the issue of whether the crime of Unauthorized Use of a Vehicle, in violation of Texas Penal Code § Ann. 31.07(a), is an aggravated felony crime of violence under section 101(a)(43)(F) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(43)(F).

The Fifth Circuit Court of Appeals has found that this statute is a crime of violence. *Brieva-Perez v. Gonzales*, 482 F.3d 356 (5th Cir.2007), *United States v. Galvan-Rodriguez,* 169 F.3d 217 (5th Cir.1999). *See also Matter of Brieva-Perez* , 23 I&N Dec. 266 (BIA 2005).

This issue was raised in a petition for certiorari filed in *Serna-Guerra v. Holder,* 2008 WL 2228868 (5th Cir. May 30, 2008), *petition for reh'g denied*, 2008 WL 4775813, *petition for cert. filed* 77 U.S.L.W. 3449 (U.S. Feb. 2, 2009)(No. 08-983). The Solicitor General has asked the Supreme Court to grant the petition for certiorari, vacate the Fifth Circuit's decision, and remand to the circuit court to further reconsider the issue. The Solicitor General points out that the Supreme Court has granted, vacated and remanded three other Fifth Circuit cases presenting the same issue, and the Government has filed a response before the circuit court in two of those cases indicating that it no longer adheres to its prior position that this statute is a crime of violence.

In light of these unusual circumstances, I am directing that cases turning on this issue be held. However, if a case can be resolved on other grounds, it does not need to be put on hold. If you do find a case that turns on the issue of this hold and cannot be resolved on other grounds, please bring it to the attention of your team leader or Senior Panel Attorney.

Memorandum

BIA 09-06

Subject	Date
CASE HOLD - Va. Code §§ 18.2-57; 18.2-57.2 - in context of crimes of violence	May 29, 2009

To	From
Board Legal Staff	David Neal, Acting Chairman

The Board has been receiving cases turning on the issue of whether a conviction under Va. Code §§ 18.2-57 or 18.2-57.2 (general assault and battery; assault and battery against a family or household member) is one "of violence" (e.g, in the context of sections 101(a)(43)(F) or 237(a)(2)(E) of the Act). The Immigration Judges and the Board have reached inconsistent rulings on this subject. As a result, the Board is considering whether to publish a decision addressing these statutes.

Accordingly, pursuant to 8 C.F.R. § 1003.1(e)(8)(iii), I am directing that the adjudication time limits be temporarily suspended in individual cases involving either of these issues. If you find a case falling in this category, please bring it to the attention of your team leader or Senior Panel Attorney.

Memorandum

BIA 09-07

Subject	Date
Case Hold Lifted - Persecution claim based on female genital mutilation (FGM)	June 23, 2009

To	From
Board Legal Staff	David L. Neal, Acting Chairman

As the result of the publication of *Matter of A-T-*, 25 I&N Dec. 4 (BIA 2009), the existing hold (temporary suspension of the adjudication time limits) on cases which involve aliens who claim a fear of persecution based on female genital mutilation (FGM) is lifted. Cases that were placed in the designated cabinets are in the process of being returned for adjudication. Further instructions will be forthcoming from your Senior Panel Attorney or team leader regarding the circulation of cases with this issue.

Memorandum

BIA 09-08

Subject	Date
CASE HOLD - *Negusie v. Holder*	August 26, 2009

To

Board Legal Staff

From

David Neal, Acting Chairman

In *Negusie v. Holder*, 129 S.Ct. 1159 (2009), the Supreme Court directed that the Board address the scope of the persecutor bar; specifically, whether an involuntariness or duress exception exists to limit application of the bar. Until a decision is rendered by the Board in *Negusie*, cases that require resolution of this issue should be held to ensure consistency.

Accordingly, pursuant to 8 C.F.R. § 1003.1(e)(8)(iii), I am directing that the adjudication time limits be temporarily suspended in individual cases involving the *Negusie* issue. If you find a case falling in this category, please bring it to the attention of your team leader or Senior Panel Attorney.